No. 89-1167

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In The
Supreme Court of the United States
October Term, 1989

ROBERT L. BRUTSCHE, M.D., *Petitioner*,

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, for purposes of determining a public official's entitlement to qualified immunity, the Court of Appeals erred in measuring the official's conduct against a "clear trend" in caselaw which might result at a future time in a controlling precedent recognizing the right, instead of looking to pre-existing "clearly established" law.

II. Whether the Medical Director of the Bureau of Prisons was reasonably placed on notice as to the lawfulness of his conduct by pre-existing "clearly established" law delineating his duties with respect to a prisoner's right to a certain level of medical care.

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v.

LINDA CLEVELAND-PERDUE, Successor
Representative and Administratrix
of the Estate of Joseph Jones, Jr
(a/k/a Roscoe Simmons), Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, the Medical Director of the Bureau of Prisons, Robert L. Brutsche, M.D., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit's opinion was entered on August 4, 1989, and rehearing was denied on October 25, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, entered on August 4, 1989 is reported at 881 F.2d 427, and is reprinted in the appendix. See p. A-1, *infra*.

The memorandum decision of the United States District Court for the Southern District of Indiana, Terre Haute Division (Brooks, J.), entered on July 5, 1988 has not been reported. It is reprinted in the appendix. See p. B-1, *infra*.

A previous opinion of the Court of Appeals for the Seventh Circuit entered on August 13, 1987 is reported at 826 F.2d 647, and is reprinted in the appendix. See p. C-1, *infra*.

An earlier memorandum decision of the United States District Court for the Southern District of Indiana, Terre Haute Division (Brooks, J.), entered on June 2, 1986 and following remand from this Court has not been reported. It is reprinted in the appendix. See p. D-1, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, the respondent brought this suit in the United States District Court for the Southern District of Indiana. On July 5, 1988, the Southern District denied the petitioner's motion for summary judgment. See p. B-1, *infra*.

The United States Court of Appeals for the Seventh Circuit entered a judgment and an opinion affirming the Southern District's order on August 4, 1989. See p. A-1, *infra*. The Medical Director of the Bureau of Prisons, Robert L. Brutsche, on August 18, 1989, petitioned the Seventh Circuit for rehearing with a suggestion for rehearing *en banc*, which was denied on October 25, 1989. See p. E-1, *infra*.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This petition raises the issue of qualified immunity and indirectly involves the eighth amendment to the United States Constitution which reads:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This case concerns the definition and application of the "clearly established" test for qualified immunity with respect to the conduct of the Medical Director of the Bureau of Prisons. Robert L. Brutsche, M.D. was the Medical Director of the Bureau of Prisons from 1969 through 1975, the year when the facts giving rise to this lawsuit occurred. His duties included planning, directing, and controlling the health care programs for approximately 20,000 inmates at over 30 penal institutions. He did not have responsibility for the daily administration of health care to any of the inmates. See p. B-2, *infra*.

William Lowe was an inmate at the federal penitentiary in Terre Haute, Indiana. He was admitted to the prison hospital on December 20, 1974 with flu-like symptoms. On December 29, 1974, Lowe was seen and treated again for flu-like symptoms. On January 2, 1975, he was treated one more time and chest x-rays were taken. The x-rays were diagnosed as normal. On January 4, 1975, he reported to the prison hospital once again complaining of flu-like symptoms. The Chief Medical Officer, Dr.

Norman Silverman, prescribed various treatments. The next day, Lowe appeared to respond to the treatments, however, he smoked continuously while in the hospital and coughed up bloody sputum. See p. B-3, *infra*. Lowe was told to stop smoking and at first he responded favorably, but later his condition worsened. Dr. Silverman then ordered that Demerol be administered. On January 6, 1975, Lowe stopped breathing and efforts to revive him were unsuccessful.

Brutsche investigated Lowe's death and recommended to the warden that Dr. Silverman be dismissed. See p. B-4, *infra*. The warden agreed and Dr. Silverman was told to either resign or be fired. He resigned. Because of the cessation of the draft, the unappealing nature of the work in a prison, and the low salary, the Bureau of Prisons had difficulty hiring full-time physicians at the Terre Haute penitentiary. See p. B-2, *infra*. In fact, the Terre Haute facility had one full-time physician and five physicians from the Terre Haute Community Hospital who rotated through the second full-time physician slot. After the resignation of Dr. Silverman, the five rotating physicians stepped up their responsibilities to provide comprehensive medical coverage. In addition, numerous other medical specialists were regularly accessible to the inmates.

Two weeks after Lowe's death, Brutsche issued a memorandum to all Regional Administrators for Medical Services in the Bureau of Prisons, recommending the maintenance of a nursing "Kardex" system to strengthen recordkeeping. Brutsche issued another memorandum which explained the Kardex's function, how they should be kept, and who should keep them. At orientations for new physicians, at meetings for Regional Administrators, and in discussions with the warden and the medical staff at Terre Haute, Brutsche stressed the need for

physicians to come into the prison hospital to personally see patients. See p. B-5, *infra*.

Brutsche searched for a replacement for Dr. Silverman by advertising, contacting the Civil Service, and seeking assignments from the Public Health Service. He monitored the situation at the Terre Haute prison through conversations with the Health Administrator, the warden, one of the rotating physicians, and the Regional Medical Director.

There were no problems until prisoner Frederick McCain arrived in Terre Haute on April 9, 1975, for an overnight stay on transfer. Medical records indicated that McCain had "chronic complaints of bronchitis" and had medicine he was to receive. When it was noticed that McCain had difficulty breathing, a physician's assistant attempted to treat him with an "inhaler," but McCain refused, insisting he be treated with certain medication, which was provided. See p. B-6, *infra*. His breathing eased and he was told to contact a guard if he had further difficulty. A guard observed him several hours later, asleep, but the next morning he did not respond. He was pronounced dead at the local hospital and an autopsy revealed "massive lung disease." The pathologist stated that he doubted that anything would have helped him. Brutsche investigated the incident and recommended the establishment of a cross-referencing system of inmates with chronic diseases.

On June 6, 1975, Robert Graham reported to the prison hospital complaining of fatigue, loss of appetite, nausea, and malaise. Graham was prescribed treatment and sent back to his cell. His condition worsened. He was then sent to the Indiana University Medical Center in Indianapolis, where he died. See p. B-7, *infra*. An autopsy revealed the cause of death as chronic pancreatitis and

hyperglycemia. Brutsche, after consulting with the local physicians, concluded that adequate care had been provided.

Joseph Jones had a long history of asthma for which he was put on a treatment plan that involved several medications. Over the next two years, he was treated in the prison hospital on numerous occasions, usually related to his asthma, and was administered medication. See pp. B-8 to B-9, *infra*. On July 28, 1975, Jones had a severe asthma attack and was admitted to the prison hospital. For the next 36 hours, he was treated at the prison hospital and then transferred to the local hospital where he stayed for about seven days.

On August 14, 1975, Jones had another asthma attack. The Chief Medical Officer at the prison, Dr. Benjamin DeGracias, who had examined Jones earlier that date, among other actions taken, prescribed the drug Thorazine over the phone in response to communications from a physician's assistant. Jones later went into respiratory arrest whereupon Dr. DeGracias ordered that Jones be sent to the local hospital. Jones died shortly after he was admitted to the hospital.

The Successor Representative and Administratrix of Jones' estate filed a *Bivens* action in the United States District Court for the Southern District of Indiana at Terre Haute against the Director of the Bureau of Prisons, Norman Carlson, Brutsche, and DeGracias. The Representative claimed that the three prison officials were deliberately indifferent to Jones' medical needs in violation of the eighth amendment prohibition against cruel and unusual punishment.

The district court dismissed the complaint on the ground that the federal claim could not survive Jones'

death. The Seventh Circuit reversed the District Court. *Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978). This Court affirmed the Seventh Circuit's decision holding that a federal common law of right of survivorship existed for *Bivens* suits. *Carlson v. Green*, 446 U.S. 14 (1980).

On remand, Carlson, Brutsche, and DeGracias moved for summary judgment on the ground of qualified immunity. The district court denied summary judgment for all three party defendants. See. pp. D-8 to D-9, *infra*. The Seventh Circuit vacated the district court's judgment and remanded the case for further proceedings. See p. C-1, *infra*.

On remand, the district court then granted summary judgment for Carlson finding that he was entitled to qualified immunity. See p. B-21, *infra*. The district court denied summary judgment for Brutsche and DeGracias based on *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *vacated sub nom., Cannon v. Thomas*, 419 U.S. 813, *cert. denied sub nom., Thomas v. Cannon*, 419 U.S. 879. (cross-petitions for certiorari).

Brutsche appealed. The Seventh Circuit affirmed the district court's decision relying upon a "clear trend" or sufficient consensus in the evolving caselaw during 1975 recognizing an inmate's right to receive medical care from a constitutionally adequate system. See p. A-7 *infra*.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari for two reasons. First, the decision of the Court of Appeals conflicts with the applicable decisions of this Court and with the decisions of other Courts of Appeals which define and apply qualified immunity. This Court has held that qualified immunity should be granted to public

officials unless the official's conduct violated a "clearly established" constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Court of Appeals, however, erroneously restated and modified the *Harlow* standard by analyzing whether in the absence of a controlling precedent at the time of the alleged acts, a "sufficient consensus had been reached indicating that the official's conduct was unlawful." See p. A-7, *infra*. Otherwise stated, the Court of Appeals sought to determine "whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." See p. A-7, *infra*. Requiring public officials to discern future trends in caselaw which might result in a controlling precedent will hinder public officials in making difficult decisions with independence and without fear of future legal consequences.

Second, the constitutional right was not "clearly established" with respect to the duties owed by the Medical Director of the Bureau of Prisons vis-a-vis a prisoner's right to a certain level of medical care. Although the Court has focused the qualified immunity analysis on the need for the right to have been clearly established within the particular factual context, *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court has not addressed the need for the caselaw to inform officials of how they should mold their conduct in order to avoid personal liability.

Changes in the qualified immunity standard and the application of that modified standard to a particular set of facts affects all public officials across the nation who make discretionary decisions that might be subject to suit. Any change in the qualified immunity standard that throws public officials into a legal debate that judges trained in the law cannot agree upon can only dampen

the zeal of public officials in the unflinching discharge of their duties.

I.

The Seventh Circuit's "clear trend" approach to qualified immunity conflicts with this Court's decisions requiring that the right be "clearly established."

Qualified immunity protects government officials performing discretionary functions from liability for civil damages. It is a judicially created doctrine which seeks to protect govenment officials from liability because few would enter into public service if their service entailed the risk of personal liability for one's decisions. In order to implement the doctrine, this Court has stated that a public official should be entitled to immunity unless the official's actions violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The right needs to be clearly established in order to impose liability on a public official because otherwise the officials would have no notice that their actions were a violation of the law. The Court stated:

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 818.

To impose liability on a public official when a right is not clearly established would discourage individuals from entering into government service for fear of liability and further hinder individuals already in public service in the unfettered performance of their duties.

The right must also be clearly established in the particular factual setting. This Court noted that the objective test of *Harlow* "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). For example, the Court explained that the right to due process of law is clearly established by the Due Process Clause, and there is a sense in which any action that violates that Clause, regardless of how unclear it may be that the particular action is a violation, violates a clearly established right. *Id.* at 639. The Court reasoned that to read *Harlow* in such a manner would convert the rule of qualified immunity into a rule of virtually unqualified liability because plaintiffs would simply allege the violation of extremely abstract rights. To avoid turning qualified immunity into a question of artful pleading thereby defeating the important policies behind the doctrine, the Court required that the right be clearly established in a particularized, and hence more relevant, sense:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted).

If it is not clear to a reasonable official in the appropriate position that the actions violate a right, then the official should be afforded qualified immunity. Indeed, where prior district and appellate court decisions in this very action evidence an inability among members of the judiciary to determine pre-existing law, it is untenable to require a lay public official to speculate as to a futuristic trend which might possibly result in a controlling precedent in order to ascertain "clearly established" law.

The Seventh Circuit modified and restated the qualified immunity standard in a manner that directly conflicts with this Court's approach in *Harlow* and *Anderson*:

> In the absence of a controlling precedent we look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a *clear trend* in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.

See p. A-7, *infra* (emphasis added).

The Court of Appeal's reformulation provides an impermissible test that is inconsistent with this Court's decisions; a "clear trend" which might result in a future controlling precedent recognizing a right is not the same as a "clearly established" right based on pre-existing law.

The D.C. Circuit rejected a similar modification of the qualified immunity test. *Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 880

(1984). The appellant had argued that the "clearly established" test for qualified immunity was coterminous with the "clearly foreshadowed" test of retroactivity. The D.C. Circuit rejected the argument, stating: "The test for qualified immunity is 'clearly established,' not 'clearly foreshadowed.' The distinction is self-evident." *Id.* at 172.

The importance of the move away from the "clearly established" standard of *Harlow* to the "clear trend" approach of the Seventh Circuit is that the "clear trend" test limits qualified immunity in a manner inconsistent with the policies behind the doctrine. Public officials in every context should be free to perform their jobs without the necessity of predicting a "clear trend" in the caselaw that might, with fair assurance, result in a controlling precedent. Stripping government officials of immunity when they are operating in the vagaries of a legal gray area is inconsistent with the notion that the legal area must be clearly established, or black and white. This case affects not only the Medical Director of the Bureau of Prisons, but all public officials who have discretionary duties. The modification of *Harlow* will adversely affect public officials who make decisions daily that could subject themselves to liability.

Because the Seventh Circuit's approach is inconsistent in principle with this Court's decisions and because the change in the qualified immunity standard will adversely affect the free and independent exercise of public officials' discretion, this Court should grant certiorari to clarify that a "clearly established" right for the purposes of qualified immunity does not encompass a "clear trend" in the law which might possibly result in a future controlling precedent recognizing that right.

II

The deliberate indifference standard under the eighth amendment was not "clearly established" in 1975 as to the Medical Director of the Bureau of Prisons because the caselaw did not put him on notice that his conduct was unlawful and was so unsettled as to make it impossible for him to mold his conduct in order to avoid liability.

In 1976, this Court recognized that deliberate indifference to a prisoner's medical needs constitutes cruel and unusual punishment under the eighth amendment. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). The contours of the right prior to that time, however, were not clearly established with sufficient particularity for a reasonable official in the same position as Brutsche to have notice that his conduct was unlawful.

It is truly curious that the Seventh Circuit identified such a "clear trend" in the law so as to satisfy the "clearly established" standard of *Harlow* when the district court twice gave considerable attention to the question and both times failed to discern such ostensibly clear law. One panel of the Seventh Circuit that decided an earlier appeal of this case opined:

> In this case, a cursory review of the undisputed facts indicates that, based solely on these facts, Carlson and Brutsche may be entitled to qualified immunity. . . .

See p. C-10 n.4, *infra*.

The question, therefore, of whether the law was clearly

established in relation to the particular facts and the particular public official proved difficult even for judges learned in the law. One Court of Appeals stated that government officials must not be liable "when maneuvering in legal realms governed by rules 'that even learned and experienced jurists have had difficulty in defining.'" *McSurely v. McClellan*, 753 F.2d 88, 100 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1005.

In this case, the district court granted summary judgment on the grounds of qualified immunity for Norman Carlson, the Director of the Bureau of Prisons, but denied summary judgment for Robert L. Brutsche, M.D., the Medical Director of the Bureau of Prisons, and Benjamin DeGracias, M.D., the treating prison doctor. The district court relied upon *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *vacated sub nom., Cannon v. Thomas*, 419 U.S. 813, *cert. denied sub nom., Thomas v. Cannon*, 419 U.S. 879 (cross-petitions for certiorari).

The Court of Appeals found that the district court's reliance on *Thomas* was misplaced. See p. A-7, *infra*. Instead, the Seventh Circuit relied upon three cases to support its argument that there was a clear trend recognizing that systemic deficiencies could constitute deliberate indifference to an inmate's medical needs, citing *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974); *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 202 (8th Cir. 1974). The district court never discussed these three cases.

The difficulty in relying upon a trend in the caselaw is that initially public officials will not know what actions they should take to avoid liability. With the first few cases of a trend, an official will not know what level of conduct will survive judicial scrutiny. The Seventh Circuit stated:

> A reasonable government official cannot necessarily be expected to recognize the significance of a few scattered cases from disparate areas of the law for a right that is just evolving. . . . While cases involving the exact fact pattern at bar are unnecessary, caselaw in a closely analogous area is crucial to permit us to conclude that reasonably diligent government officials would have known of the caselaw, related it to the situation at hand, and molded their conduct accordingly.

Lojuk v. Johnson, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986). In order for public officials to be able to mold their conduct according to the caselaw, must be settled and not evolving; to use the Court's words, the caselaw must be "clearly established."

Newman, *Bishop*, and *Finney* were the beginning of a trend recognizing that the systemic deficiencies in a prison's health care system can effectively deny a prisoner any medical treatment at all and therefore amount to deliberate indifference under the eighth amendment. Those cases, however, did not establish what would constitute deliberate indifference when a prisoner had access to medical facilities and services and the question turned on what level of medical care was constitutionally mandated, especially with regard to a distant administrator who had no responsibility for providing direct medical care at a geographically remote location.

The record in this case reveals that the medical system at the Terre Haute penitentiary provided extensive care to the inmates, including Jones. For example, from July 31, 1974 through July 28, 1975, Jones received extensive treatment for his chronic asthmatic condition, including: (1) receiving outpatient treatment 16 times;

(2) receiving medication or prescriptions over 20 times; and (3) being hospitalized at a private institution. The district court chronicled the extensive medical care that Jones received both in the Terre Haute prison and upon transfer to an outside hospital from July 28, 1975 until his death on August 14, 1975. See pp. B-8 to B-9, *infra*. This is not a case where the medical delivery system effectively denied an inmate access to adequate care.

The district court also related the actions Brutsche took in order to improve the medical system at the Terre Haute facility. He recommended to the warden that Dr. Silverman be replaced and then hired Dr. DeGracias to take his place. He recommended to all Regional Administrators for Medical Services that a nursing "Kardex" be used to strengthen recordkeeping. He established a cross-referencing system of inmates with chronic diseases. He also recommended that full medical records be kept on everyone admitted to the prison hospital. These actions fulfilled Brutsche's duty to supervise the health care program of the Bureau of Prisons.

Reading the trilogy of cases the Court of Appeals relied upon would not help a reasonably diligent official in Brutsche's position to understand what more he should or could have done. The facts in *Finney* are in such sharp contrast to the facts of this case that a reasonable public official in the position of Medical Director of the Bureau of Prisons might not even equate the two situations, *Finney v. Arkansas*, 505 F.2d 194, 204 (8th Cir. 1974) (1,200 inmates were "continuously denied medical and dental care"). In *Bishop*, the series of incidents that the appellate court held stated a claim under 42 U.S.C. § 1983 involved instances where the prisoners were denied access to doctors for as long as six months in matters such as backaches and for up to three

days in more serious matters such as vomiting blood. *Bishop v. Stoneman*, 508 F.2d 1224, 1225 (2d Cir. 1974).

These cases not only are insufficiently analogous to inform Brutsche that his conduct was violating the prisoners' rights, but also inadequate because they do not inform Brutsche of what more he should or could have done as a supervisor of the entire medical system in the Bureau of Prisons. Even if the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may be granted qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights. *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987).

In *Newman*, the Fifth Circuit discovered that the legal justifications for judicial intervention in prison affairs was far from settled, "[T]he reasons employed in justifying judicial invalidation of prison practices is as mottled as the varied explications of the cruel and unusual punishment clause proffered in *Furman v. Georgia*, 408 U.S. 238. . . ." *Newman v. Alabama*, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974). Other circuit court cases held that government officials did not violate an inmate's rights when they made sincere and reasonable efforts to address a prisoner's medical problem. *Startz v. Cullen*, 468 F.2d 560 (2d Cir. 1972) (prison officials refused to give inmate strict fat-free diet as recommended by doctor, but did assist him in choosing proper food along with medication). In many cases in which an inmate received medical treatment and the alleged constitutional deprivation centered upon the nature or quality of the care, courts refused to recognize a constitutional claim. *Goode v. Hartman*, 388 F.Supp. 541 (E.D. Va. 1975); *Russell v. Sheffer*, 528 F.2d 318 (4th Cir. 1975); *Stokes v. Hurdle*, 393 F. Supp. 757 (D. Md. 1975), *aff'd*

sub nom., Stokes v. Brown, 535 F.2d 1250 (4th Cir. 1976) (mem.). Thus, the trend beginning with *Newman*, *Finney*, and *Bishop* was nascent and had not reached a consensus among the courts across the nation, particularly with respect to a public official in Brutsche's position.

Brutsche, as the Medical Director of the Bureau of Prisons, supervised the health care programs of 20,000 inmates at over 30 penal institutions. He did not have responsibility for the daily administration of health care to any of the prisoners. While he could make recommendations to the warden at each of the institutions, he did not have the authority to order the warden to implement such changes. At each prison, the warden had a Chief Medical Officer and a Hospital Administrator working directly under him. The Chief Medical Officer at the Terre Haute penitentiary when Jones passed away was Benjamin DeGracias. While Jones' constitutional right was clearly established for a person in DeGracias' position, it was not clearly established for one in Brutsche's.

The Court has acknowledged that high officials require greater protection than those with less complex discretionary responsibilities. *Harlow*, 457 U.S. at 807 (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). Greater protection is needed because higher officials need greater leeway to encourage the vigorous exercise of their official duties. Failing to provide immunity to an official in Brutsche's position will chill the exercise of discretion by other federal officials who are in a supervisory role such as Brutsche. Allowing the extension of liability to climb up the ladder to the Medical Director of the Bureau of Prisons will have a negative effect beyond the Bureau of Prisons.

Therefore, this Court should grant this petition to address the need for the caselaw to be clearly established

in order to place public officials on notice with regard to the lawfulness of their conduct. When an official is in a national supervisory role, unless the caselaw makes it clear that the conduct in which he is engaging is unlawful, the official should be immune from trial and from civil damages.

CONCLUSION

For these reasons, this Court should grant this petition and issue a writ of certiorari.

Respectfully submitted,

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January 22, 1990

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2513

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS),

Plaintiff-Appellee,

v.

ROBERT L. BRUTSCHE, M.D.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. TH 76-93-C—**Gene E. Brooks**, *Judge.*

ARGUED MAY 30, 1989—DECIDED AUGUST 4, 1989

Before CUMMINGS, CUDAHY and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* This difficult case, which involves the issue of a federal prison official's immunity from a suit alleging deliberate indifference to a prisoner's medical needs, comes before us for the third time. *See Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978), *aff'd Carlson v. Green*, 446 U.S. 14 (1980); *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987). Defendant Robert Brutsche appeals from a district court order denying his motion for summary judgment on the ground of qualified immunity. For the reasons discussed below, we affirm.

I.

The facts giving rise to this litigation are adequately set forth in our previous decisions and will be repeated here only as necessary to elucidate the issue presented by this case. On the morning of January 6, 1975, William Lowe, an inmate at the federal penitentiary at Terre Haute, Indiana died in the prison's hospital.[1] Shortly before his death, Lowe, on the recommendation of the hospital's sole full-time physician,[2] Dr. Silverman, had ingested the drug Demeral. At the time he prescribed the drug, Dr. Silverman was at home and despite the protests of the physician's assistant at the scene, adamantly refused to come to the prison hospital. In addition, Silverman rejected the suggestion that Lowe be transferred to an area hospital.

The death of William Lowe prompted an investigation by defendant Robert Brutsche, the medical director of the federal prison system.[3] During the course of his investigation, Brutsche visited the Terre Haute Prison where he interviewed several prison officials about alleged problems in the administration of medical services. Based on these interviews and his own observations, Brutsche recommended that Silverman[4] be relieved of his duties and that the record-keeping procedures at the hospital be improved. Silverman ultimately resigned as the hospital's physician leaving a vacancy that was not filled for the next several

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[1] Lowe's death sparked a two-day work stoppage by inmates at Terre-Haute. *See Cleavinger v. Moore*, 474 U.S. 193 (1986).

[2] In addition to Silverman, the prison employed five part-time physicians on a rotating basis.

[3] Brutsche's duties included planning, implementing, directing and controlling the health care programs for some 20,000 inmates at over 30 penal institutions. Defendant, however, did not have responsibility for the daily administration of health care to inmates.

[4] Silverman was 72 years old, suffered from cerebral arteriosclerosis, and had been taking Valium for depression at the time of Lowe's death.

months. Brutsche, however, did not check whether his proposed changes were implemented.

Between January 6, 1975, the date of Lowe's death, and August, 1975, two more inmates died at the prison's hospital. The first prisoner, Frederick McCain, was admitted to the hospital on April 9, 1975 after complaining of breathing problems. McCain, who suffered from chronic bronchitis, was given drugs normally prescribed for his condition and initially appeared to respond favorably. The next morning, however, McCain was dead. Brutsche investigated the circumstances surrounding McCain's death and concluded that adequate medical care had been provided.

On June 6, 1975, inmate Robert Graham reported to the hospital complaining of fatigue, loss of appetite, nausea and malaise. Graham was examined by a physician's assistant who prescribed treatment and sent Graham back to his cell. Three days later, however, Graham, was removed to the Indiana University Medical Center in Indianapolis where he soon passed away. Brutsche also investigated Graham's death and concluded that adequate medical care had been provided.

In August, 1975, Dr. Robert DeGracias assumed the duties of full-time physician at the Terre Haute Prison. On August 14, 1975 inmate Joseph Jones was admitted to the prison hospital after a severe asthma attack. Dr. DeGracias prescribed the drug Thorazine over the phone but refused to come to the hospital to examine Jones personally. At approximately 11:00 p.m., Jones went into respiratory arrest. When DeGracias was informed of this fact he ordered Jones sent to a local hospital. Jones, however, died shortly after he was admitted to the hospital.

Jones' death prompted another investigation by Brutsche. As a result of this investigation, Brutsche made a series of recommendations to the warden. These recommendations included keeping full in-patient records on anyone admitted to the prison hospital, utilizing outside facilities, encouraging better communications among the staff, and implementing a policy concerning the availability of physicians during off-duty hours.

Shortly after Jones' death, his mother filed a *Bivens* suit against Brutsche, DeGracias, and Norman Carlson, the director of the Bureau of Prisons, claiming that her son's death was caused by the defendants' deliberate indifference to Jones' medical needs. *See Estelle v. Gamble*, 429 U.S. 97 (1976). The district court dismissed the complaint on the ground that the federal claim could not survive Jones' death but this court reversed. *Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978). The Supreme Court affirmed our decision holding that a federal common law of survivorship existed for *Bivens* suits. *Carlson v. Green*, 446 U.S. 14 (1980).

On remand, the defendants moved for summary judgment on the ground of qualified immunity. The district court denied this motion and the defendants took an interlocutory appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987), we vacated the district court's decision and remanded with directions for the district court to evaluate the entire record in determining the qualified immunity issue. *Id.* at 650. On remand, the district court held that Carlson, as a "supervisor of supervisors," was entitled to qualified immunity but that Brutsche and DeGracias were not. With regard to Brutsche, the district court held that there were several disputed issues that precluded the entry of summary judgment in his favor including: (1) whether the physician's assistants were adequately trained; (2) whether DeGracias had received any instruction about transporting seriously ill prisoners to area hospitals; (3) whether Brutsche had conducted a thorough investigation after the first death at the prison hospital; (4) whether the fact that the record-keeping recommendations were not implemented prior to Jones' death reflected on Brutsche's liability and (5) whether Brutsche should have implemented a policy concerning the need for physicians to come to the hospital to examine prisoners facing life-threatening conditions in the wake of Lowe's death. Brutsche now appeals the district court's denial of his qualified immunity motion for the second time. DeGracias has not taken an interlocutory appeal.

II.

The doctrine of qualified immunity protects government officials performing discretionary functions from liability for civil damages. *Klein v. Ryan*, 847 F.2d 368, 371 (7th Cir. 1988). The doctrine itself is not contained in any statute. *See Malley v. Briggs*, 475 U.S. 335, 339 (1985). Rather, qualified immunity is a judicially created doctrine that stems from the conclusion that few individuals will enter public service if this service entails the risk of personal liability for one's decisions.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court, overruling previous law, held that a purely objective inquiry should be used in determining whether a public official is entitled to qualified immunity. Under the *Harlow* standard, qualified immunity should be granted when the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818. The objective standard is designed to protect the public interest in deterrence of and compensation for an official's unlawful conduct while safeguarding the official's ability to make difficult decisions with independence and without fear of consequences. *Id.* at 819. Unfortunately, the *Harlow* Court failed to elaborate on the meaning of the term "clearly established right" choosing to have the lower courts develop the definition on a case-by-case basis. *Id.* at 818 n.32.

In *Anderson v. Creighton*, 483 U.S. 635 (1986), the Supreme Court attempted to provide direction in determining when a right has been clearly established. In *Anderson*, the Court, concerned that the artful pleader could convert the rule of qualified immunity into a rule of virtually unqualified liability by alleging violation of extremely abstract rights, emphasized that the right allegedly violated must have been clearly established in a particularized sense. *Id.* at 639-40. Thus, while the very action in question need not have previously been held unlawful, the contours of the right must have been established so that the unlawfulness of the defendant's conduct would have been apparent in light of existing law. *Id.* The pur-

pose of this requirement is to ensure that a reasonable official would or should have been aware of the rights he or she may be violating. *Id.*

In the present case, the plaintiff alleged that Brutsche's failure to remedy systemic problems at Terre Haute's medical facility constituted deliberate indifference to the medical needs of inmates. In *Estelle v. Gamble*, 429 U.S. 97, 105 (1976), the Supreme Court explicitly recognized that deliberate indifference to a prisoner's medical needs constitutes cruel and unusual punishment in violation of the eighth amendment. *Estelle*, however, cited several pre-1975 appellate court cases with approval *id.* at n.10, including *Thomas v. Pate*, 493 F.2d 151 (7th Cir.), *cert. den. sub. nom. Thomas v. Cannon*, 419 U.S. 879 (1974), and the defendant does not dispute that the deliberate indifference standard had been clearly established by 1975. Rather, defendant argues that the contours of the right had not been established with sufficient particularity so that a reasonable official in his position would have known that the alleged conduct was unlawful.

Our review of the relevant caselaw reveals two distinct categories of deliberate indifference claims. The first category involves claims of isolated instances of indifference to a particular inmate's medical needs. A prime example of such a case is *Thomas v. Pate* where the plaintiff claimed that he was injected with penicillin despite informing the administering nurse that he was allergic to the drug. The second category involves claims that systemic deficiencies at the prison's health care facility rendered the medical treatment constitutionally inadequate for all inmates. *See e.g. Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. den.* 450 U.S. 1041 (1981). This case involves allegations that fit under the latter category. Consequently, for purposes of qualified immunity analysis, we must determine whether in 1975, a reasonable official in Brutsche's position would have understood that a failure to correct systemic deficiencies in the prison's medical services akin to those alleged in the plaintiff's complaint constituted deliberate indifference to an inmate's medical needs.

In denying defendant's qualified immunity motion, the district court concluded that *Thomas v. Pate* had clearly established the right at issue. This reliance was misplaced. As noted above, *Thomas v. Pate*, was a category 1 not a category 2 deliberate indifference case. In fact, our independent research has revealed no decision by this court recognizing that a failure to remedy systemic deficiencies in health care services at a prison violated the eighth amendment prior to 1983. *See Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. den.* 468 U.S. 1217 (1984). Consequently, we are unable to agree with the district court that a controlling precedent in 1975 clearly established that defendant's alleged conduct constituted deliberate indifference to an inmate's medical needs.

The presence of a controlling precedent is not, however, a *sine qua non* of a finding that a particular right has been clearly established within the meaning of *Harlow*. *See Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. den.* 109 S.Ct. 497 (1988). In the absence of a controlling precedent we look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time. This approach makes eminent sense for it precludes an official from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue.

After reviewing the relevant case law we conclude that a clear consensus had been reached indicating that a prison official's failure to remedy systemic deficiencies in medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs. In *Newman v. Alabama*, 503 F.2d 1320 (5th Cir.

1974), *cert. den.* 421 U.S. 948 (1975), the Fifth Circuit affirmed a district court decision finding that systemic deficiencies in the Alabama prison system violated inmates' eighth amendment rights. Among the deficiencies that the district court noted were inadequate staffing, treatment by unqualified personnel, incomplete medical records and lack of written procedures establishing the duties and responsibilities of the medical personnel—charges that were made against the Terre Haute prison. In affirming the district court's entry of injunctive relief, the court explicitly stated that systemic deficiencies of this type, "present grave constitutional problems." 503 F.2d at 1331.

Newman v. Alabama, did not represent a novel interpretation of the eighth amendment in 1974. In *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2nd Cir. 1974), the court, faced with evidence of several disturbing incidents over a short period of time, explicitly asserted that a claim that "medical facilities were so wholly inadequate for the prison population's needs that suffering would be inevitable" is cognizable under section 1983. Moreover, the Eighth Circuit took the same view. In *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 202 (8th Cir. 1974), a class action suit against high state prison officials the court recognized that systemic deficiencies in the administration of medical services are of constitutional significance. These deficiencies included absence of a full-time physician at frequent intervals, unsatisfactory record-keeping and, most troubling to the court, inadequate emergency procedures. The appellate court found that these conditions required immediate correction and directed the district judge to look to Judge Frank Johnson's decree in *Newman* in fashioning a remedy.[5]

[5] The trend established by *Newman*, *Finney* and *Stoneman*, has been followed by several other circuits. *See Inmates of Allegheny City Jail v. Pierce*, 612 F.2d 754 (3rd Cir. 1979); *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982); *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. den.* 450 U.S. 1041 (1981); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 at n.12 (11th Cir. 1985).

In view of *Newman*, *Finney* and *Bishop*, we believe that a failure to correct systemic deficiencies in the delivery of health care services at a prison violated clearly established law in 1975. Moreover, given the types of systemic problems addressed in *Newman* and *Finney*, we believe that a reasonable official in Brutsche's position would have known that a failure to remedy the alleged inadequacies at Terre Haute constituted deliberate indifference to the medical needs of the inmate population. Accordingly, we find that the district court properly denied Brutsche's motion for qualified immunity.

AFFIRMED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

MRS. MARIE GREEN, Administrator of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons) and next of kin of Joseph Jones, Jr.
Plaintiff

vs. CAUSE NO. TH 76-93-C

NORMAN CARLSON; ROBERT L. BRUTSCHE, M.D.; DR. BENJAMIN DeGRACIA; WILLIAM WALTER and EMMETT BERRY
Defendants

ORDER

This matter comes before the Court on Defendants' Motions for Summary Judgment. All parties having been heard, based on the record the Court GRANTS defendant Carlson's Motion and DENIES defendants Brutsche and DeGracias' Motions. Defendant Carlson is GRANTED judgment and hereby DISMISSED.

IT IS SO ORDERED at Evansville, Indiana this 5th day of July, 1988.

/s/ Gene E. Brooks
Gene E. Brooks, Chief Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record

FINDINGS OF FACT

A. UNDISPUTED FACTS

Defendant, Norman Carlson, is the Director of the Bureau of Prisons. He directs all the activities of the Bureau of Prisons including medical care. He is authorized to delegate his duties. Responsibility for the administration of medical care was delegated by Carlson to the "Medical Director." In 1969 Dr. Robert Brutsche was appointed Medical Director, a post he held in 1975 when the facts which gave rise to this lawsuit occurred.

Dr. Brutsche did not have responsibility for daily administration of medical care to inmates; however, it is undisputed that he was responsible for planning, implementing, directing and controlling the total comprehensive health care program of the Bureau of Prisons. Under Dr. Brutsche there was a Deputy Medical Director and five Regional Directors of Medical Services. At each prison there is a Chief Physician and a Hospital Administrator, both of whom work directly under the warden. The Chief Physician is responsible for the professional medical care, and the Hospital Administrator is responsible for the management of hospital administrative functions. At the time of the actions which resulted in this suit, Carlson and Brutsche oversaw approximately 20,000 inmates at over 30 institutions.

At the time of the first significant incident in this case, the death of William Lowe, there was one full time physician, Dr. Silverman, employed at the Terre Haute prison instead of the usual two. This was because the expiration of the draft, low salaries, and the unappealing nature of the work make it difficult to hire a physician. Instead, the second physician "slot" was filled by rotating five local physicians.

Dr. Silverman was hired by Dr. Brutsche at the age of 72. Also, prior to Lowe's death, Brutsche was aware that Silverman was becoming enfeebled, and Dr. Freed, one of the rotating physicians, knew that he was taking Valium for depression.

William Lowe died on January 6, 1975. On December 20, 1974 he was seen and treated at the penitentiary hospital for flu-like symptoms. On December 29, 1984 he was seen and treated for flu-like symptoms. On January 2, 1975 he was treated again for flu-like symptoms although a chest x-ray was taken which was interpreted as normal. He was also given three days off from work, and bed rest. On January 4, 1975, he reported to the hospital complaining again of flu-like symptoms. He was admitted to the hospital and diagnosed by a physician's assistant as having pneumonia. Dr. Silverman was contacted by phone and he prescribed various treatments. Among those treatments was Demerol. The physician's assistant suggested to Dr. Silverman that Demerol would be counterductive, and he agreed and rescinded that order.

On January 5, 1975, Lowe appeared to respond to the treatments; however, he smoked continuously while in the hospital and coughed up bloody sputum. On January 6th the seriousness of his smoking was explained and he was told to stop smoking. He seemed to respond to the treatment at first, but about 5:30 a.m. his condition worsened. Silverman was called and the physician's assistant recommended he be moved to the local hospital. Silverman initially agreed, but before Lowe could be moved Silverman called back and ordered Lowe be kept at the penitentiary hospital, and that Lowe be administered Demerol. The Demerol was administered at approximately 6:05 a.m. and Lowe stopped breathing at 6:15. Efforts to revive him were unsuccessful.

The warden immediately contacted Carlson's office. Carlson and Brutsche met and discussed the situation and decided Brutsche should travel to Terre Haute to investigate. On the same day, January 7th, a work stoppage occurred at the prison in protest of the quality of medical care.

Brutsche interviewed the hospital administrator, apparently the physician's assistants who were present at the time, the warden, Dr. Freed and Dr. Silverman. Brutsche did not talk to any prisoners. It is not clear whether he talked to physician's assistant Snowden who was present during the last few hours prior to Lowe's death.

Brutsche "generally agreed" with a review of the treatment given to Lowe by the hospital generally and by Silverman in particular. That review was primarily very critical of the failure of Silverman to personally come to the hospital and see Lowe, and of some of the treatments prescribed.

Brutsche's own interview with Silverman led him to the "casual clinical observation" that Silverman was suffering from "cerebral arteriosclerosis," and he had been taking Valium for depression related to family problems. It was decided that Silverman should not continue as prison physician. Brutsche recommended to the warden that Silverman be dismissed, and the warden agreed. Silverman was told to either resign or he would be fired. He resigned.

Silverman's "slot" was filled, until another full time physician could be hired, by stepping up the responsibilities of the rotating physicians. In addition, there were several other specialists who were accessible to the medical staff of the prison.

About two weeks after Lowe's death, and as a result of his investigation, Brutsche issued a "Memorandum" to all Regional Administrators for Medical Services in the Bureau of Prisons. He recommended the maintenance of a nursing "kardex" to strengthen record keeping. A week later he issued a second "Memorandum" which essentially explained their function and gave instructions as to who should keep them and how they should be kept. This is apparently the extent of the changes Brutsche recommended in writing, as a result of Lowe's death. No written report was submitted by Brutsche to Carlson, although Brutsche verbally informed Carlson of his findings and it is not clear whether a written report was the normal procedure. There was no follow-up by Brutsche to see that any of these changes were in fact instituted.

At orientations for new physicians, at meetings for Regional Administrators, and with the warden and medical staff at Terre Haute, Brutsche stressed the need for physicians to come into the prison hospital to personally see patients.

At about this time there were several letters sent to Carlson from prisoners and Congressmen protesting the treatment given Lowe and the medical care generally at the prison in Terre Haute. All letters were responded to. In one response to a letter from a Congressman, Carlson represented that the Demerol given Lowe was "acceptable professional judgement," and was not likely the cause of Lowe's death, and claimed that a full time physician was on staff at Terre Haute, which was not accurate because of Silverman's resignation.

Carlson also explained that the prison hospital was accredited by the Joint Commission on Accreditation of Hospitals. The prison hospital had been accredited for one year as of November, 1974, and several recommendations

for improvement had been made along with the accreditation. Accreditations were only made for two years, one year, or not given, and were normally accompanied by recommendations.

Brutsche began looking for a full time physician to replace Silverman by advertising, contacting the Civil Service, and seeking assignment from the Public Health Service. He also watched the situation at Terre Haute through conversations with the Health Administrator, the warden, Dr. Freed and the Regional Medical Administrator.

From late January until the death of inmate Frederick McCain, April 10, 1975, there were no problems with the health care at the Terre Haute prison brought to the attention of Carlson or Brutsche.

Frederick McCain was brought to the Terre Haute penitentiary April 9, 1975 for an overnight stay on transfer from Leavenworth to Marion. A medical record that accompanied him showed he had "chronic complaints of bronchitis," and had medications he was to receive. The physician's assistant observed McCain was having difficulty breathing and told him to report back if the medications did not work. Shortly after McCain was in his cell a guard called the physician's assistant to report McCain was having difficulty breathing. The physician's assistant came to McCain's cell and attempted to treat him with an "inhaler," but McCain refused treatment. McCain insisted he be treated with certain medications and these were administered. His breathing was observed to ease, and he was again told to contact a guard if he had further difficulty. He was observed again in several hours, asleep.

When a guard tried to awaken McCain in the morning

for the trip to Marion, he did not respond. He was pronounced dead at the local hospital ten minutes later. An autopsy revealed "massive lung disease," and the pathologist stated that he doubted that anything would have helped him.

The medical care given McCain was reviewed by Brutsche, who discussed it with Freed, the other rotating physicians, the Health Administrator and the warden, and at the regional level. Brutsche's conclusion was the care met acceptable medical standards; however, a cross-referencing system of inmates with chronic diseases was established.

On June 8, 1975 inmate Robert Graham died. On June 6, 1975, Graham reported to the prison hospital complaining of fatigue, loss of appetite, nausea and malaise. He said he had had these symptoms for four days; however, he had not informed the medical staff.

He was examined by a physician's assistant and prescribed treatment. The next evening a guard noticed that Graham appeared very ill. The guard requested that a physician's assistant look at Graham. Graham was removed to the hospital on a stretcher and examined. Dr. Bristol, one of the rotating physicians, recommended by phone that Graham be sent to the local hospital, which he was. The next day Graham was sent by ambulance to the Indiana University Medical Center in Indianapolis. Air transportation was unavailable. A short while after arrival in Indianapolis Graham succumbed. An autopsy revealed the cause of death as chronic pancreatitis and hyperglycemia.

The circumstances surrounding McCain and Graham's deaths were reviewed by prison officials, the consulting physicians, and the Regional Administrator,

and by Brutsche. Both reviews concluded adequate and appropriate medical care had been provided. Brutsche discussed the deaths of McCain and Graham with Carlson, who relied on Brutsche's determination that adequate care had been provided. Consequently, no changes were instituted.

No written report was made concerning the deaths of McCain and Graham. No formal reporting or evaluation procedures were established, nor were any visits made to Terre Haute by Carlson or Brutsche (the record is not clear whether any reporting procedures existed in the first place).

In August of 1975 Dr. Benjamin DeGracias was hired as the full time staff physician to replace Dr. Silverman (who resigned in January). There were no written procedures for hiring and evaluating new doctors. DeGracias was hired off the Civil Service register. Brutsche called his references partly because he was concerned that DeGracias had had more jobs than one would expect; however, his references all checked out. He was not interviewed personally. He reported for work August 3, 1975.

Plaintiff, Joseph Jones (a/k/a Roscoe Simmons), died August 14, 1975. He had a long history of asthma. Upon entering the prison system in 1973, he was put on a treatment plan which involved several medications. He was eventually transferred to Leavenworth (from McNeil Island where he entered the system) where his treatment continued.

In June, 1973 Jones asked to be transferred to Terre Haute, as he could be closer to his family. In July he was transferred to Terre Haute. Over the next two years he was seen in the prison hospital numerous times, usually

related to his asthma, and he continued to take his medications.

Early July 28th Jones was admitted as an in-patient in the prison hospital due to a severe asthma attack.

For approximately the next 36 hours he was treated as an in-patient in the prison. Jones was then transferred to the local hospital where he stayed for about seven days. While in the local hospital one of Jones' treating physicians recommended that he be transferred to another prison because of climate; however, the doctor who discharged him discharged him back to the prison. He had improved while in the local hospital.

Prior to his discharge from the local hospital the Hospital Administrator issued a "Transfer Recommendation" which recommended that Jones be transferred to a facility in Texas. The recommendation assumed that Jones would not be released from the hospital until he could be transferred. The day after his discharge back to the prison, a written request for transfer was sent to the warden of the facility in Texas.

The day after Jones was released from the local hospital he was released from the prison hospital back to "full duty." Four days later Jones was seen as an out-patient in the prison hospital by Dr. DeGracias. He was "wheezing" in both lungs and he told DeGracias that he wanted to be transferred to another facility.

On August 14, 1975 Jones was admitted to the prison hospital for a severe asthma attack. Dr. DeGracias prescribed treatment; however, he did not see Jones personally. That evening Jones did not improve. The physician's assistant on duty called DeGracias frequently for direction. DeGracias would prescribe treatment, but,

despite the assistant's repeated requests that he come to personally see Jones, he did not come in. DeGracias also rejected the assistant's recommendation that Jones be transferred to the local hospital.

At approximately 10:00 p.m. the physician's assistant called DeGracias and mentioned that Jones was restless and required light manual restraint. DeGracias prescribed Thorazine, which was administered. At approximately 11:00 p.m. Jones went into respiratory arrest. Artificial respiration was administered and DeGracias was called and arrived at the prison approximately 15 minutes later. He ordered Jones taken to the local hospital. At 11:40 Jones was pronounced dead at the local hospital.

Brutsche made a one day visit to the prison to investigate Jones' death, although he did not talk to the physician's assistant on duty the evening of Jones' death. He rechecked DeGracias' references at his prior place of employment and discussed the situation in detail with Carlson. In September, Brutsche issued a list of recommendations to the warden. He recommended that full inpatient medical records be kept on anyone admitted to the prison hospital, that there be liberal utilization of outside facilities, that steps should be taken to encourage better communication among the staff, there should be a review of all "problem" cases and there should be a policy concerning the availability of physicians during off-duty hours.

In October, Brutsche sent a Memo to the warden confirming a conversation they had in which Brutsche reemphasized in more detail the record keeping requirements the prison should institute.

There were several letters sent to Carlson by members

of Congress inquiring into the circumstances of Jones' death. A letter prepared by Brutsche was sent out over Carlson's signature which essentially stated that an investigation had been carried out, involving interviews of staff who had been responsible for Jones, and that his asthma was so severe that it was unlikely that any alternative or additional treatment would have been successful.

B. DISPUTED FACTS

There are numerous factual disputes in the record, and more importantly, numerous inferences to be drawn from those facts which are in dispute.

Plaintiffs contend that the physician's assistants were inadequately trained. Specifically, an affidavit of William Walter, the physician's assistant on duty the night Jones died, states that Walter received no "formal" training from the Bureau of Prisons. However, Walter's deposition lists numerous seminars he attended, and "in-service" training he received from the Bureau of Prisons while employed there. Other physician assistants' depositions reveal training they received while employed by the Bureau of Prisons.

Plaintiffs contend that Dr. DeGracias received no orientation before he started in the rotation at the prison, or even before Jones' death, so that he was unfamiliar with the prison facilities, the responsibilities *vis* a *vis* himself and the physician's assistants, the procedures for use of local facilities, or his responsibilities during off-duty hours. Defendants contend that DeGracias was undergoing a two week orientation from the day he started. The evidence is conflicting on this point.

There is conflicting evidence on whether a written report was standard procedure after Brutsche's investigation.

Plaintiffs contend that the failure of Brutsche to prepare a written report after his investigation of the deaths of Lowe and Jones is evidence of a cover-up. On the other hand, it is undisputed that there are numerous written documents documenting the events surrounding the deaths of Lowe and Jones which were prepared apparently as a matter of course. There is a dispute as to the inferences to be drawn from the facts surrounding the death of Lowe, as it relates to the competence of Dr. Silverman, and the notice Brutsche and Carlson had of Silverman's "problems."

There is a dispute as to the thoroughness of Brutsche's investigation after Lowe's death. Specifically, plaintiffs argue that Brutsche should have interviewed prisoners and more physician's assistants. If he had, plaintiffs contend he would have found out that the medical care at the prison was grossly inadequate. Defendants argue that Brutsche made a reasonable investigation and made reasonable recommendations under the circumstances.

Plaintiffs argue that the fact that the record keeping procedures recommended by Brutsche were not implemented is relevant to the issue of his liability. Defendants argue that the implementation is the job of the prison staff. Brutsche can only make recommendations.

Plaintiffs argue the facts imply that there was not a good faith effort to find a full time physician for the prison after Silverman resigned, pointing principally to the seven month period until DeGracias was hired.

Plaintiffs argue, perhaps most importantly, that Brutsche's recommendations were not comprehensive enough. Plaintiff argues that, based just on what Brutsche did see, without the benefit of a more thorough

investigation, he should have seen that the medical care was grossly inadequate and taken steps to rectify the situation. Defendants argue that Brutsche's recommendations, coupled with his obtaining the resignation of Dr. Silverman, were sufficient action under the circumstances. In particular, there is a dispute over whether there should have been a policy regarding when a patient should be personally seen by a physician. Plaintiffs see the lack of personal attentiveness of Drs. Silverman and DeGracias for Lowe and Jones, respectively, as highly relevant of care that was "deliberately indifferent."

Of course, the Court is not in a position to detail every inference from the facts that are, or may be, disputed. However, it does feel it has listed the most significant disputes here.

DISCUSSION

The Court's task, now that the facts have been spelled out, is to:

> "Look at all the undisputed evidence in the record, construed in a light most favorable to the non-movant.... If the undisputed facts, so read, show that the defendants' conduct, as a matter of law, violated no clearly established legal norms, then the district court must grant the defendant qualified immunity. However, if there are issues of disputed facts upon which the question of immunity turns, or if it is clear that the defendants' conduct did violate clearly established norms, the case must proceed to trial." *Green*, 826 F2d at 652.

Thus, the question for this Court to decide is whether there were "clearly established legal norms," applicable

to the conduct at issue, when the public official acted. This issue is much easier to state than it is to decide. The issue has, in fact, been stated a variety of ways: "Whether the conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald,* 457 U.S. 818 (1981); "whether the law was clear in relation to the specific facts confronting the public official when [he or she] acted," *Coliozzi v. Walker,* 812 F.2d 304, 308 (7th Cir. 1987); or whether " the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates" a clearly established right, *Anderson v. Creighton,* 483 U.S. ____, 97 L.Ed.2d 523, 531, 107 S.Ct. 3034, 3038 (1987).

The conduct at issue in this case occurred from January through August of 1975. Plaintiff alleges a violation of Eighth Amendment rights: The right to be free from cruel and unusual punishment. Plaintiff raises this right in the context of medical care for those in the custody of the United States prison system. Therefore, the issue, more specifically stated, is whether, considering the specific facts of this case, defendants conduct from January through August of 1975 was clearly established as an Eighth Amendment violation at the time.

The leading case on medical care in prisons in 1975 was *Thomas v. Pate,* 493 F.2d 151 (7th Cir. 1974). In *Thomas* the court held that plaintiff had stated constitutional claims insofar as he alleged facts "which suggest that the medical care provided is so clearly inadequate as to amount to a refusal to provide essential care or is so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition. *Thomas* 493 F.2d at 158.

The plaintiff in *Thomas* met that standard when he

alleged that he was given penicillin despite it being clear that he was allergic to penicillin, that the removal of sutures was delayed because of punitive confinement, and that a skin condition he had was knowingly ignored.

Defendant challenges the applicability of *Thomas v. Pate* to this case, as it applies to defendants Carlson and Brutsche, because they acted in a supervisory role. They were not responsible for, nor physically present during, the day to day decisions with regard to the medical treatment at issue. Defendants argue that *Thomas v. Pate* applies only to those responsible for the day to day care of the inmates, so that the law, as it applies to Carlson and Brutsche, was not clearly established as of August, 1975.

Exactly who the defendants were in *Thomas* is not clear from the case. There is one reference to the liability of "prison authorities" with respect to plaintiff being forced to eat food that made him ill. In *Bass v. Wallenstein,* 769 F.2d 1173 (7th Cir. 1985), plaintiff brought a claim based on the Eighth Amendment in the context of prison medical care. The Court interpreted *Thomas* to apply to an assistant warden and the Medical Unit Administrator. These defendants were supervisory officials in the sense that they were not directly administering medical care themselves, but both were officials with official and regular jobs within the prison. In other words, they had day to day contact with the medical system in the prison.

With regard to the two "supervisory" defendants' argument that they were entitled to qualified immunity, the Court stated ". . . the deliberate indifference standard or willful neglect standard nevertheless was clearly established." *Bass,* 769 F.2d at 1186, *citing Thomas v. Pate, supra* as authority. The problem is that the basis for defendant's argument that the standard was not clearly established is not stated in the opinion. It is not clear

whether they argued simply that the standard was not established, or that they tried to distinguish the standard based on their status as supervisory personnel. Further, it is not clear whether these administrators are "closely analogous" to the administrator defendants here.

In *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir. 1984), plaintiff brought an Eighth Amendment claim "against the warden and other officials of [the prison]." Again, these were obviously supervisory officials in that they were not directly responsible for administering health care, but they also were prison employees with offices in the prison, and day to day contact and authority over the medical care system.

The Court stated first that "the defendants do not argue that the willful neglect standard was not clearly established when [plaintiff] died", *Joseph*, 779 F.2d at 1219, then went on to say that:

> "The case is within the rule that prison officials are not entitled to an objective good faith defense . . . if they are aware of a risk of injury to an inmate and nevertheless fail to take appropriate steps to protect the inmate from that known danger." *Joseph*, 739 F.2d at 1250.

The Court did not expressly state who is considered a "prison official," nor is it clear whether knowledge of "a risk of injury to an inmate" means specific knowledge of a specific inmate, as was apparently the case in *Joseph*, or if that means generalized knowledge of a risk to inmates generally.

Finally, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the court held that the Director of the Department of

Corrections, and the medical director of the Department (who was also the chief medical officer of the prison hospital), were not entitled to qualified immunity for an Eighth Amendment claim in the context of prison medical care. The Court stated:

> "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain... proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoners' needs or by the prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under §1983." *Estelle,* 429 U.S. at 104-5.

The Court cited *Thomas v. Pate* as authority for the statement that prison guards intentionally denying or delaying access to medical care stated a claim; however, that is obviously not the situation here, as applied to Carlson and Brutsche. The two problems *Estelle* presents are that it was decided after the conduct in question here, and, even if it did apply (plaintiff argues it does because of its reliance on *Thomas*), it is still not clear whether it would apply to these defendants.

The authority cited above seems to state the "deliberate indifference" standard as virtually a blanket proposition when used in a prison medical care context; however, whether or not that was the case, it now appears that it is not.

In the Seventh Circuit's opinion in this case, *Green v.*

Carlson, 826 F.2d 652 n.4 (7th Cir. 1987), the Court obviously considered it possible that defendants, who were clearly involved in the administration of prison medical care, may be entitled to qualified immunity. However, the Court did not specify exactly what the dispositive issues were in this inquiry. In any case, it is clear from *Green, supra,* and *Anderson, supra,* that the qualified immunity analysis requires close scrutiny of both the facts of each case and the applicability of relevant case law; otherwise,

> "plaintiff's would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging a violation of extremely abstract rights." *Anderson,* 97 L.Ed.2d at 530.

Another one of the many difficulties this Court has had with this case is that there is virtually no law granting qualified immunity to a defendant in a medical care/prison context. In other words, many cases have found defendants liable, thereby setting a liability floor, but noone have set a ceiling by which this Court can judge the limits of the liability.

Perhaps the most analogous case is *Kurowski v. Krajewski,* No. 86-C-586, (7th Cir. June 2, 1988). In that case the Court rejected defendant's claim that he was entitled to qualified immunity. The defendant was a judge who oversaw the county public defender program. He fired two of the assistant public defenders, and they sued claiming they were fired because of their political beliefs. *Branti v. Finkel,* 445 U.S. 507 (1981), decided prior to the firings, had held that political beliefs and affiliations are not a legitimate basis for firing public defenders. The defendant in *Kurowski* tried to distinguish *Branti* by arguing that he was a judge who, consequently, had more leeway

in hiring and firing than the defendant in *Branti*, who was the chief public defender. The Court stated that *Branti* "turned on the characteristics of the assistant public defender's job, not on the office of the person doing the firing." *Kurowski*, slip op, at 3.

This Court finds that the prior cases in the inmate/medical care area turn on the characteristics of defendant's conduct, not his position. However, that does not end the inquiry because one's position may provide their conduct with different characteristics.

In *Thomas* the Court apparently found that administrative authorities could be liable for requiring defendant to eat a particular diet even though it made him ill. The *Joseph* case interpreted *Thomas* in a more general way to apply to those who were aware of a risk of injury to inmates and fail to take appropriate steps. Most importantly, in the *Bass* case, the Seventh Circuit found that *Thomas* applied to administrators who were aware of deficiencies in the sick call procedure and staffing and training of personnel. Defendants argued that they were not personally responsible for the health care of the inmates, but the Court found that they were personally responsible for implementing the health care system which was indirectly responsible for the plaintiff's death.

The Court holds that defendant Brutsche is not entitled to immunity. It is undisputed that Brutsche made two trips to the Terre Haute prison. It is undisputed that he conducted investigations into the deaths of Lowe and Jones, that he hired Dr. DeGracias, that he made recommendations on how to improve the health care system, that he oversaw the training of the physician's assistants, and, most importantly, that he had the power to implement changes in the system. On the other hand, there are disputes regarding how much Brutsche knew, or should

have known, of deficiencies in the health care system at Terre Haute. While most of the cases state that defendant's liability is predicated on knowledge of a risk, it would be putting form over substance to exclude risks of which defendant reasonably should have been aware. Here, there is a substantial question regarding the scope of Brutsche's investigation of the deaths of the inmates preceding Jones--in particular, Lowe's death.

There are legitimate factual disputes concerning the training given physician's assistants, the training given Dr. DeGracias when he was hired, and whether the investigation and recommendations he made after the death of Lowe were adequate, simply unreasonable or evidenced a deliberate indifference to the inmate health considering the highly questionable care given Lowe, and the persistent complaints about the health care system by inmates both before and after Lowe's death.

In short, the Court holds that there are disputed issues of fact upon which the questions of immunity turn as to Dr. Brutsche. There are reasonable inferences of disputed facts that, if resolved in favor of plaintiff, would establish that a reasonable official in Brutsche's shoes, at the time of the conduct in question, would have understood that what he was doing violated clearly established constitutional rights as set down by *Thomas v. Pate,* as it was interpreted by *Bass v. Wallenstein.*

Whether this Court would have found a reasonable official in Brutsche's shoes would have known that the "contours of the right" were clearly established as to him simply as a result of *Thomas v. Pate,* is questionable; however, the gloss put on *Thomas* by *Joseph* and *Bass,* has convinced the Court that it would be "splitting hairs" to distinguish Brutsche's situation from *Thomas.* In other words, it seems clear that it would be

unreasonable for one in Brutsche's shoes to believe that he was not subject to the "deliberate indifference" standard simply because he was not making day to day medical care decisions. The similarities greatly outweigh the differences.

The Court further holds that defendant Carlson is entitled to immunity. The essence of plaintiff's argument against Carlson is that he had most, if not all, of the knowledge that Brutsche has so he is liable in the same way. However, the undisputed facts show that Carlson never made a personal visit to the prison, and that he was virtually completely reliant on Brutsche's advice to make decisions. He had no medical education. Plaintiff's have not shown any first hand knowledge by Carlson of the conditions at the prison medical facility, or that he made any substantive decisions concerning the medical facilities independent of Brutsche. While this Court found, with regard to Brutsche's liability, that day to day contact with prison medical conditions is not necessary for a finding that the deliberate indifference standard is applicable, it does find that some personal knowledge of conditions and consequent risk is necessary. Brutsche had the primary responsibility for medical care at the prison, and Carlson only secondary. Brutsche arguably had personal knowledge, or should have had knowledge, that the medical care at Terre Haute was seriously lacking, and Carlson had no such personal knowledge. It simply strains *Thomas,* even with the gloss put on it by *Bass,* to find that it would apply to a supervisor of supervisors.

In short, the Court holds that there are no material issues of disputed fact upon which the question of immunity turns as to Carlson, and that a reasonable official, in Carlson's shoes, at the time of the conduct in question, would not have understood that what he was doing

violated clearly established constitutional rights.

As for defendant DeGracias, the Court holds that the law was clearly established at the time, and, therefore, he is not entitled to qualified immunity. The undisputed facts show that Dr. DeGracias was the treating physician the evening that Jones died. It shows that he was requested on several occasions by the physician's assistant to personally come in and see Jones because of his worsening condition; however, he did not come in until after Jones had a cardiac arrest. It showed he refused to transfer Jones despite at least one request to do so. It shows that he prescribed a drug that, an inference could be drawn, was contra-indicated, and might have contributed to Jones' death, just to keep Jones from complaining. There is also a reasonable inference that DeGracias was annoyed by the repeated phone calls by the physician's assistant and was not particularly concerned with Jones' problems.

Thomas v. Pate, supra, dealt expressly with the liability of a treating physician in a prison hospital. The Court held that the physician could be liable for the "refusal to provide essential medical care," after notice of the complaint, or "if the care is so blatantly inappropriate as to evidence intentional mistreatment." *Thomas,* 493 F.2d at 158.

In that case they found that the administration of penicillin to an inmate who had made it known he was allergic to penicillin, stated a claim. The Court also stated that the failure to treat a condition, such as refusing to personally see plaintiff, stated a claim if substantial harm resulted. *Thomas,* 493 F.2d at 158.

These fact situations are sufficiently analogous to the present one, as established by the undisputed facts,

to put a reasonable person on notice that such conduct would amount to a constitutional violation. Defendant DeGracias' claim for qualified immunity is denied.

IT IS SO ORDERED AT Evansville, Indiana this 5th day of July, 1988.

/s/ Gene E. Brooks, Judge

Gene E. Brooks, Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2096

MARIA GREEN, Administratrix of the Estate of JOSEPH JONES, JR. (a/k/a ROSCOE SIMMONS), and next of kin of JOSEPH JONES, JR.,

Plaintiff-Appellee,

v.

NORMAN CARLSON, ROBERT L. BRUTSCHE, M.D., and BENJAMIN DEGRACIAS, M.D.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. 76 C 93—**Gene E. Brooks**, *Judge.*

ARGUED JUNE 4, 1987—DECIDED AUGUST 13, 1987

Before FLAUM and MANION, *Circuit Judges*, and GORDON, *Senior District Judge.**

FLAUM, *Circuit Judge.* Eleven years ago, Maria Green brought this suit, contending that her son's death in the infirmary of the United States Penitentiary at Terre Haute was due to the defendants' deliberate indifference to his

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* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

serious medical needs. At the close of discovery, the defendants moved for summary judgment on grounds of qualified immunity. The district court, without reference to the specific facts of the case, held that the Eighth Amendment right at issue was clearly established at the time of the defendants' alleged misconduct, and therefore ruled that the defendants were not entitled to qualified immunity. We hold that the district court should have reviewed the entire record and considered the qualified immunity issue in light of all the undisputed facts. We therefore vacate the district court's judgment and remand the case for further proceedings.

I.

On August 14, 1975, Joseph Jones, Jr., a prisoner at the United States Penitentiary at Terre Haute, died of asthma in the prison infirmary. Jones' mother, Maria Green, as the administrator of her son's estate, subsequently brought a *Bivens* action under the Eighth Amendment against, among others, Norman Carlson, the director of the Bureau of Prisons; Robert Brutsche, the medical director of the Bureau of Prisons; and Benjamin DeGracias, the prison doctor. The complaint alleged that Jones' death was caused by the defendants' deliberate indifference to Jones' serious medical needs. On January 10, 1977, the district court dismissed the complaint for lack of subject matter jurisdiction, on the ground that the federal claim could not survive Jones' death. This court reversed, holding that a federal common law right of survivorship existed for *Bivens* actions. *See Green v. Carlson*, 581 F.2d 669 (7th Cir. 1978). The Supreme Court affirmed. *See Carlson v. Green*, 446 U.S. 14 (1980).

On remand, after extensive discovery, the defendants moved for summary judgment based on a number of grounds, including qualified immunity. The district court denied the motion. Eighteen months later, after the collapse of a proposed settlement agreement, the defendants again moved for summary judgment, repeating their assertion that they were entitled to qualified immunity. The

court denied this motion as well. *See Green v. Carlson*, No. 76 C 93, at 10 (S.D.Ind. June 2, 1986). The defendants now appeal from the district court's denial of qualified immunity.

II.

A.

Under the doctrine of qualified immunity, government officials performing discretionary functions are shielded from liability for civil damages unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has stated that this inquiry is a question of law. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). However, in order to determine whether the law was clearly established at the time of the defendant's alleged violation, a court cannot look at the legal norm at issue in the abstract. Rather, the test for qualified immunity is "whether the law was clear in relation to the specific facts confronting the public official when [he or she] acted." *Coliazzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987); *see Anderson v. Creighton*, 107 S.Ct. 3034, 3039 & n.2 (1987).

In this case, the district court's analysis of the qualified immunity issue made no reference to the evidence in the record. Rather, the court simply framed the question before it as "whether the constitutional right at issue—that the defendants were deliberately indifferent to the decedent's medical needs—was clearly established as of August 1975." *Green v. Carlson*, No. 76 C 93, at 10 (S.D. Ind. June 2, 1986). The district court therefore erred in not considering the specific facts of this case. *See Anderson*, 107 S.Ct. at 3039.[1]

[1] In *Anderson*, the plaintiffs brought a *Bivens* action under the Fourth Amendment against Anderson, an FBI agent, based on

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Both sides in this case agree that the court should have examined evidence beyond the plaintiff's allegations. The parties disagree, however, about what evidence the court should have looked to in determining the "specific facts." The appellants contend that the court should have examined all the undisputed facts, read in the light most favorable to Green; Green argues that the court was limited to "the plaintiff's facts." Whether a district court should consider evidence beyond the allegations in the plaintiff's complaint in determining whether the defendant is entitled to qualified immunity is technically an open question in our circuit, *see Scott v. Lacy*, 811 F.2d 1153, 1154 (7th Cir. 1987), although we have implicitly approved the prac-

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[1] *continued*

a warrantless search of their home. The district court granted Anderson's motion for summary judgment on the grounds that Anderson had had probable cause and that there were exigent circumstances. However, the Eighth Circuit reversed, finding that unresolved factual disputes precluded summary judgment on the merits. The Eighth Circuit also held that Anderson was not entitled to summary judgment on qualified immunity grounds, because the Fourth Amendment right at issue—"the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there are exigent circumstances," *Anderson*, 107 S.Ct. at 3038—was clearly established. Anderson filed a petition for certiorari on the qualified immunity issue.

The Supreme Court reversed the judgment of the Eighth Circuit. The Court held that the court of appeals had erred in stating the legal principle at issue in overly abstract terms. Under the Eighth Circuit's approach, "[a] passably clever plaintiff would always be able to identify an abstract clearly established right that the defendant could be alleged to have violated," *id.* at 3039 n.2, and thus "*Harlow* would be transformed from a guarantee of immunity into a rule of pleading," *id.* at 3039. On remand, the court was to permit Anderson to argue that the law was not clearly established as to the facts of his particular situation. Therefore, although *Anderson* makes clear that the qualified immunity inquiry is tied to the particular facts of the case, the Court left open the question of what evidence the court should look to in establishing these facts.

tice, *see, e.g., Kompare v. Stein*, 801 F.2d 883, 889 (7th Cir. 1986). We conclude that when considering the qualified immunity issue on a motion for summary judgment, a district court should consider all of the undisputed evidence in the record, read in the light most favorable to the non-movant. Because the district court in this case did not follow this procedure, we vacate its judgment and remand the case for further proceedings.

B.

The circuits are divided on the issue of whether a district court considering a qualified immunity claim after discovery has begun should examine only the plaintiff's allegations, or whether the court should consider all undisputed evidence in the record in establishing the specific facts necessary to frame the qualified immunity analysis. In *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), the First Circuit concluded that a district court faced with a claim of qualified immunity must "accept[ ] at face value the facts as presented by one party and limit[ ] the immunity inquiry to the clarity of the right violated," *Bonitz*, 804 F.2d at 167. Thus, on appeal the court looked only at the plaintiff's allegations in the complaint, even though the parties had completed discovery.[2]

The Eighth Circuit, however, has concluded that a district court may properly look beyond the plaintiff's allegations when considering a claim of qualified immunity that arises after discovery has begun. In reaching this conclusion, the Eighth Circuit relied on the dissent in *Bonitz*,

[2] In *Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255 (1st Cir. 1987), the First Circuit retreated somewhat from this position. In the opinion, authored by the same judge as the majority opinion in *Bonitz*, the court stated that when the plaintiff has "alleged the facts defining the harm in sketchy fashion," *id.* at 1259, or has "neglected to indicate why he or she falls within the sphere of protection," *id.* at 1260, the court will consider "other uncontested facts in the record that will permit us to address the immunity question," *id.*

and on the apparent practice in our circuit. *See Trapnell v. Ralston*, 819 F.2d 182, 184 n.1 (8th Cir. 1987); *Myers v. Morris*, 810 F.2d 1437, 1459 (8th Cir. 1987). The *Bonitz* dissent argued that the district court should look beyond the plaintiff's allegations when considering a qualified immunity claim because the relevant inquiry is the defendant's actual conduct. *See Bonitz*, 804 F.2d at 178 (Campbell, C.J., dissenting). In *Kompare v. Stein*, 801 F.2d 883, 889 (7th Cir. 1986), without addressing the issue, this court looked beyond the plaintiffs' allegations to other evidence in the record in deciding whether the defendant was entitled to summary judgment on grounds of qualified immunity. *See also Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. denied*, 107 S.Ct. 172 (1986) (examining all the evidence produced at trial in considering motion for judgment notwithstanding the verdict on qualified immunity grounds). In these cases, we implicitly directed a district court, when considering a qualified immunity claim on summary judgment, to examine all the undisputed evidence in the record. We think that this procedure is correct, and therefore we make our direction explicit.

First, our conclusion is consistent with a district court's usual practice in handling a summary judgment motion. On a motion for summary judgment, the district court is not limited to the plaintiff's complaint, but considers all the undisputed facts, read in the light most favorable to the non-movant. *See* Fed. R. Civ. Pro. 56, advisory committee note. The Supreme Court clearly has envisioned that the issue of qualified immunity may arise in the context of a summary judgment motion, and has given no indication that the district court ruling on a motion for summary judgment on grounds of qualified immunity should follow a different procedure than if summary judgment had been requested on other grounds. *See, e.g., Anderson*, 107 S.Ct. at 3042 n.6 (noting that, on remand, discovery may be necessary to answer the qualified immunity question on summary judgment); *Mitchell*, 472 U.S. at 526. Indeed, the *Mitchell* Court itself looked beyond the plaintiff's allegations in determining the defendant's motive. *See, e.g., Mitchell*, 472 U.S. at 535 n.13.

Second, our conclusion is consistent with the nature of the qualified immunity inquiry. A public official performing a discretionary function is entitled to qualified immunity unless the contours of the right that the official allegedly violated are "sufficiently clear that a reasonable official would understand that what [he or she] is doing violates that right," *Anderson*, 107 S.Ct. at 3039. This inquiry is necessarily "fact-specific," *id.*, and focuses on "the circumstances with which [the official is] confronted," *id.*; *see Malley v. Briggs*, 106 S.Ct. 1092, 1096 (1986) ("Under the *Harlow* standard . . . an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner."). Because qualified immunity turns on the defendant's actual conduct, the district court should examine all the evidence available to it in determining what that conduct was. Thus, when this issue arises on a motion for summary judgment, as in this case, the district court should consider not only the plaintiff's allegations, but all the undisputed facts in the record when deciding whether the defendant's conduct violated clearly established legal principles.

Third, our conclusion is consistent with the rationale behind the doctrine of qualified immunity. The doctrine of qualified immunity is intended to shield public officials not only from liability, but also from the burdens of trial. *See Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 816. If a district court could never look beyond the plaintiff's allegations when considering a claim of qualified immunity, a complaint with artfully-pleaded facts would eliminate the possibility of qualified immunity, even in cases where discovery later revealed that the plaintiff's initial allegations were incorrect, incomplete, or misleading. This result would greatly weaken a public official's protection against the risks of trial.[3]

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[3] Under our holding, the defendant has an incentive to take repeated appeals from the denial of qualified immunity as the case progresses, hoping that the additional evidence will persuade the

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Finally, our conclusion is consistent with the Supreme Court's holding in *Mitchell* that the qualified immunity inquiry is a pure question of law, *see Mitchell*, 472 U.S. at 528 n.9. The majority in *Bonitz* believed that if a court considered evidence beyond the plaintiff's complaint, it would have to make factual findings about the parties' conduct. *See Bonitz*, 804 F.2d at 167. However, a court considering a motion for summary judgment based on qualified immunity has before it a pure question of law: whether, based on all the undisputed facts, the defendant's conduct violated any clearly established constitutional or statutory right. The court need not (and should not) resolve any disputed questions of material fact.

We therefore conclude that when a claim of qualified immunity arises as part of a summary judgment motion, the district court should, as in any summary judgment

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[3] *continued*

court to alter its ruling. This case, now eleven years old, may prove to be an example of this problem. This incentive is especially troubling given the close resemblance of the qualified immunity question to the merits. "[U]nder *Harlow*, the district court must conduct a two-part analysis: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?" *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986). The first question concerns "the merits," and ordinarily there is no appeal from a denial of summary judgment on this issue, because the order is considered interlocutory. However, the second question—the qualified immunity question—is intertwined with the first. Thus, an appellate court reviewing the denial of qualified immunity may occasionally find itself deciding the first question in order to answer the second, even though if the denial of summary judgment were on any other grounds the issue would be unreviewable. As a result, the defendant has an opportunity for "unlimited interlocutory 'merits' appeals from the denial of summary judgment in the guise of appeals concerning limited immunity," *Bonitz*, 804 F.2d at 181 (Campbell, C.J., dissenting). We agree with the dissenting judge in *Bonitz* that the *Mitchell* Court probably did not foresee this result. *See Bonitz*, 804 F.2d at 180-81 (Campbell, C.J., dissenting). However, the result is inescapable, given the premise of *Mitchell* that the two inquiries are "conceptually distinct," *Mitchell*, 472 U.S. at 527-28.

case, look at all of the undisputed evidence in the record, construed in a light most favorable to the non-movant. *See Bonitz*, 804 F.2d at 178 (Campbell, C.J., dissenting). If the undisputed facts, so read, show that the defendant's conduct, as a matter of law, violated no clearly established legal norms, then the district court must grant the defendant qualified immunity. However, if there are issues of disputed fact upon which the question of immunity turns, or if it is clear that the defendant's conduct did violate clearly established norms, the case must proceed to trial.

III.

The appellants contend that, even though the district court failed to incorporate the undisputed evidence produced by discovery into its qualified immunity analysis, this court should conduct its own examination of the record and decide, reading all the facts in light most favorable to Green, whether the appellants violated any clearly established constitutional or statutory rights. However, in light of the complexity of this case, and the district court's finding that numerous disputed issues of fact remain, we decline to reach the merits of the defendants' qualified immunity claim. Instead, we remand the case for a finding as to whether, based on all the undisputed evidence before the court, it can be established that the defendants' conduct violated clearly established law. The judgment of the district court is vacated and the case remanded for proceedings consistent with this opinion.[4]

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[4] The dissent concludes that the district court did in fact apply the standard we have set forth, and offers as proof of this position quotations from the court's discussion of the merits. However, there is no reason to assume, as the dissent does, that because the district court considered the undisputed facts in its analysis of the merits, the court must also have considered the undisputed facts in its qualified immunity analysis. On the contrary, as we have noted, the district court's qualified immunity discussion made no reference to any of the facts of this case, but focused entirely on the question of whether deliberate indifference to a prisoner's medical needs constituted a clearly established Eighth Amendment

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GORDON, *Senior District Judge*, dissenting. Because I am unable to agree with the majority's basic conclusions that the district court's analysis "made no reference to the evidence in the record" and that the district court "erred in not considering the specific facts of this case," I respectfully dissent.

Although the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), described the focus of a determination as to qualified immunity as "a purely legal one," *id.* at 528 n.9, it is clear that a qualified immunity inquiry requires some examination of the facts in the case. *See Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1987), 55 U.S.L.W. 5092, 5093 (U.S. June 25, 1987).

Until the instant decision, the proper technique for a pretrial ruling on the issue of qualified immunity has been "unsettled." *See Scott v. Lacey*, 811 F.2d 1153, 1154 (7th Cir. 1987). Assuming that by dint of the majority's expression in the case at bar, it now becomes the rule of this circuit that factual considerations must be explored, I believe that the district court's decisions fully meet not only the *Mitchell* standard but also the newly adopted standard.

In its two written decisions, emcompassing 22 pages, the district court amply demonstrated that it had exam-

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[4] *continued*
violation as of August, 1975. *See supra* at 3. This discussion was clearly insufficient under *Anderson*. *Id.*

The dissent also errs in assuming that, in this case, the disputed facts that precluded summary judgment on the merits would also preclude a grant of qualified immunity. Under *Anderson*, a defendant is entitled to qualified immunity if, as a matter of law, a reasonable official in the defendant's position could believe that his or her actions were lawful. *See Anderson*, 107 S.Ct. at 3038. In this case, a cursory review of the undisputed facts indicates that, based solely on these facts, Carlson and Brutsche may be entitled to qualified immunity, even if the existence of disputed issues of fact precludes a grant of summary judgment on the merits. However, because the record is complex and extensive, and because the district court chose not to discuss all the material factual disputes it had found, we remand rather than reverse the district court's judgment.

ined the entire record and was basing its summary judgment rulings on the facts.

In its second decision (dated June 2, 1986), rejecting the defendants' request for summary judgment on the ground of qualified immunity, the district court stated:

> While the plaintiff must overcome a high standard of proof to succeed, the defendants cannot escape the fact that Mr. Jones was the fourth prisoner to die at the Terre Haute penitentiary in 1975. It would be premature for this Court to conclude, even with the thousands of pages of material including "new" evidence and case law submitted by counsel in support of the motion, that there is no other interpretation of the facts or that there are no genuine issues as to material facts in this case. On the contrary, there would appear to be serious disputes as to facts and the plaintiff is entitled to her day in court.

Defendants-Appellants App. p. 409.

While it may be argued that the above quotation is somewhat conclusory, it is implied that the trial judge considered "thousands of pages of material." The following portions of the same written decision demonstrate that the district court had, indeed, examined not only the plaintiffs' complaint but also many other factual facets of the record:

> It is undisputed that from January to August, 1975, four prisoners died while in the care, custody and control of the Terre Haute penitentiary. After the death of inmate, William Lowe, on January 6, 1975, Mr. Carlson and Dr. Brutsche discussed the information they received regarding Loew's [sic] death. Dr. Brutsche subsequently traveled to the Terre Haute penitentiary to conduct what he terms a "clinical-type analysis" regarding the treatment and care of Mr. Lowe. The plaintiff questions this and terms Dr. Brutsche's investigation a cover-up which ignored the systematic problems and resource inadequacies which contributed to Mr. Lowe's death.

> Regarding Dr. Brutsche's investigation into Mr. Lowe's death, it is undisputed that Dr. Brutsche recommended to Warden Charles Benson that Dr. Silverman, the full-time physician at the penitentiary, be dismissed from his position. Dr. Silverman subsequently resigned on January 17, 1975. Dr. Brutsche also recommended that a "nursing Kardex" be established at all Bureau of Prisons' institutions to alleviate a deficiency in record keeping. Dr. Brutsche also recommended that progress notes on inpatients be improved. The Court initially feels that these facts indicate a good-faith investigation on the part of Dr. Brutsche, not a cover-up. However, it is unclear whether any of Dr. Brutsche's recommendations other than Dr. Silverman's dismissal were implemented. Whether the failure to see that his recommendations were in fact implemented was reasonable, negligent, or deliberately indifferent to the needs of the prison population when more inmate deaths occurred is a question of fact for the jury and not one for the Court to resolve on a motion for summary judgment.
>
> . . . .
>
> The record contains other factual discrepancies. The matters discussed herein are *only examples* of conflicting issues of material fact and are not to be taken as the only conflicts in the record. (emphasis in the original).

Defendants-Appellants App. pp. 405-407.

In its decision of October 19, 1984, in which the district court first denied the defendants' application for summary judgment on the ground of qualified immunity, it explicitly itemized the materials that it examined in reaching its conclusions:

> The Court has considered the statements of facts and briefs in support of the motions. The Court also has considered the following documents filed with respect to the motion: Certified exhibits "A" through "J" filed by defendants Norman Carlson and Robert L. Brutsche,

> M.D. (inasmuch as those defendants are represented by the same counsel all other references in this entry are to "Carlson/Brutsche"); the deposition of Norman Carlson and exhibits attached thereto; the deposition of Robert L. Brutsche, M.D. and exhibits attached thereto; the affidavits of Charles L. Benson, Robert L. Brutsche, Larry E. Madigan, John W. Smith, William Garrigan, Edward Griffin, Johnny Copher, John Freed, and Mark O. Thompson, all filed by Carlson/Brutsche; the affidavits of William Walter, David Saxner, Robert L. Cohen, M.D., and Ralph T. Potkin, M.D., all filed by the plaintiff in her response to the motions for summary judgment.

Defendants-Appellants App. pp. 215-216.

The principal thrust of the defendants on this appeal is that their actions did not violate any of the decedent's "clearly established" constitutional rights; although that is surely the gravamen of the defendants' appeal, the majority has reversed on the ground that the district court failed to recite the factual basis for its denial of summary judgment. However, the latter ground was not even advanced by the appellants, and, more importantly, it is an erroneous ground as, I believe, the quoted portions of the record establish. This flawed view on the part of the majority is especially troublesome when it means that upon remand, the district court will be obliged to retrace the same ground that it has twice before traveled in this eleven-year-old case.

Judge Brooks' findings that there are inconsistencies in the evidence and that there are genuine issues as to material facts for trial regarding the defense of qualified immunity should be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

MRS. MARIE GREEN,
Adminstrator of the Estate
of JOSEPH JONES, JR. (a/k/a
ROSCOE SIMMONS) and next of
kin of JOSEPH JONES, JR.
Plaintiff

vs. CAUSE NO. TH 76-93-C

NORMAN CARLSON, Director
Federal Bureau of Prisons
et. al.

O R D E R

This cause is before the Court upon the motion of the defendants, Norman Carlson, Robert L. Brutsche, M.D., and Dr. Benjamin DeGracia, for their second summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there exists no genuine issue of material fact, and that judgment should be entered in their favor on all plaintiff's charges as a matter of law. The plaintiff, Mrs. Marie Green, has responded to the defendants' second motion for summary judgment by moving to strike the same on the grounds that such response is untimely, substantially repetitive, frivolous, and a bad-faith attempt to obtain an appeal on the issue of qualified immunity which has heretofore been denied by this Court in a prior order. Moreover, plaintiff moves for an award of costs and fees pursuant to Rule 11 and Title 28, U.S. §1927.

RESPONDEAT SUPERIOR

The U.S. Supreme Court has held that the doctrine of respondeat superior is inapplicable to suits brought under 42 U.S.C. §1983. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 1018, 56 L.Ed.2d 611 (1978). Moreover, by analogy, several Courts of Appeals have held that respondeat superior is similarly inapplicable to *Bivens*-type actions. *Laswell v. Brown*, 683 F.2d 261 (8th Cir. 1982); *Black v. United States*, 534 F.2d 524 (2d Cir. 1976).

In order for a plaintiff to develop a prima facie case, he must demonstrate a personal involvement on the part of each defendant.

> "To recover for damages under 42 U.S.C. §1983, a plaintiff must establish defendant's personal responsibility for the claimed deprivation of a constitutional right. *Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981). However, a defendant's direct participation in the deprivation is not required. An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982).
>
> SMITH v. ROWE, 761 F.2d 360, 369 (7th Cir. 1985).

Consequently, in order for a supervisory official to be found liable there must be "a causal connection, or an affirmative link, between the misconduct complained of

and the official sued...." *Smith v. Rowe*, 761 F.2d at 369, citing *Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 561 (1976).

The Court, after having this issue before it for a second time and noting that a *Bivens*-type action does not provide for respondeat superior liability, nevertheless finds that a reasonable inference could be drawn from facts supporting plaintiff's allegations that Mr. Carlson had notice of the alleged maltreatment and failed to remedy such maltreatment.

While the Court must reject the plaintiff's theory of respondeat superior as to Mr. Carlson, facts in the record indicate that he was aware of potential problems in the medical care rendered at the Terre Haute penitentiary. Most importantly, an inference can be made that Mr. Carlson took an active role in addressing the situation at the penitentiary.

The plaintiff has alleged that Mr. Carlson and Dr. Brutsche have legally mandated supervisory responsibilities over the medical care at the United States Penitentiary at Terre Haute which were carried out with a deliberate indifference to the needs of the prison population. Mr. Carlson responds by saying it has not and is not his duty to become involved in the daily "individual case-by-case medical care accorded to persons in the custody of the Bureau of Prisons." Dr. Brutsche also argues that in 1975, he did not have any direct responsibilities for the daily direct administration of medical care to inmates at the various Bureau of Prisons' institutions. Again, the plaintiff initially complained that the defendants' course of conduct was willful and so blatantly inappropriate as to evidence intentional maltreatment and the plaintiff acknowledges that a showing of mere negligence on the part of the defendants will not support recovery.

It is undisputed that from January to August, 1975, four prisoners died while in the care, custody and control of the Terre Haute penitentiary. After the death of inmate, William Lowe, on January 6, 1975, Mr. Carlson and Dr. Brutsche discussed the information they received regarding Lowe's death. Dr. Brutsche subsequently traveled to the Terre Haute penitentiary to conduct what he terms a "clinical-type analysis" regarding the treatment and care of Mr. Lowe. The plaintiff questions this and terms Dr. Brutsche's investigation a cover-up which ignored the systematic problems and resource inadequacies which contributed to Mr. Lowe's death.

Regarding Dr. Brutsche's investigation into Mr. Lowe's death, it is undisputed that Dr. Brutsche recommended to Warden Charles Benson that Dr. Silverman, the full-time physician at the penitentiary, be dismissed from his position. Dr. Silverman subsequently resigned on January 17, 1975. Dr. Brutsche also recommended that a "nursing Kardex" be established at all Bureau of Prisons' institutions to alleviate a deficiency in record keeping. Dr. Brutsche also recommended that progress notes on inpatients be improved. The Court initially feels that these facts indicate a good-faith investigation on the part of Dr. Brutsche, not a cover-up. However, it is unclear whether any of Dr. Brutsche's recommendations other than Dr. Silverman's dismissal were implemented. Whether the failure to see that his recommendations were in fact implemented was reasonable, negligent, or deliberately indifferent to the needs of the prison population when more inmate deaths occurred is a question of fact for the jury and not one for the Court to resolve on a motion for summary judgment.

The plaintiff also disputes whether the defendants made good-faith efforts to replace Dr. Silverman. Dr. Silverman was eventually replaced by Dr. DeGracia on

August 3, 1975. The plaintiff notes that for over seven months (from January 17, 1975 to August 3, 1975), there was no full-time physician employed at the Terre Haute penitentiary. However, the defendants point out that there were five rotating consulting physicians from the Terre Haute community who increased their responsibilities for medical services at the prison. As to the time it took to replace Dr. Silverman, the defendants claim it is difficult to fill such positions and they did their best.

The record contains other factual discrepancies. (The matters discussed herein are *only examples* of conflicting issues of material fact and are not to be taken as the only conflicts in the record.) For instance, the plaintiff claims Dr. DeGracia received no orientation and that his obligations and duties were never explained. The defendants claim Dr. DeGracia was in fact in orientation from the day he was hired, August 3, 1975, until August 17, 1975. A more material issue of fact concerns the training and experience of the physician's assistants and other support personnel and their relationship to the physicians at the Terre Haute penitentiary. All four of the inmates who died at the penitentiary from January to August, 1975, William Lowe, Frederick McCain, Robert Graham, and the plaintiff's decedent, Joseph Jones, Jr., were often attended to by physician's assistants and other staff members, after consulting with physicians by telephone. An affidavit of Dr. Ralph T. Potkin dated September 4, 1984, who has reviewed the medical records in this case, notes,

> "No provisions seem to have been made for requiring a physician to personally examine the patient in this setting. It would be mandatory to have a policy established whereby any patient with known significant medical history who needs

to be seen on more than several occasions in a short period of time to be seen by the physician himself rather than to repeatedly be evaluated by a physician assistant and have the care left to chance."

It may not be fair to say that treatment by a well-trained and qualified physician's assistant is leaving care to chance but here, William Walter, the physician's assistant who cared for Mr. Jones, admits he received no formal training from the Bureau of Prisons. In an affidavit, Mr. Walter claims the only formal training he ever received in assisting a physician was a several-week general course provided by the United States Navy in 1946, more than thirty years before the death at question here occurred. Yet, the night of Mr. Jones' death, his care was left to Mr. Walter. Mr. Walter and the staff called Dr. DeGracia at least five times before he came to the penitentiary at 11:15 p.m. Dr. DeGracia then ordered an ambulance and Mr. Jones was transferred to Terre Haute Regional Hospital at 11:30 p.m. At 11:40 p.m., the hospital notified the penitentiary that Mr. Jones was dead.

The plaintiff claims that although Dr. DeGracia knew of Mr. Jones' condition, he did not have him admitted to Terre Haute Regional Hospital. The plaintiff claims Dr. DeGracia refused to come to the pentientiary despite the repeated calls of Mr. Walker, although he lived only five minutes from the penitentiary. The defendants say Dr. DeGracia had been at the penitentiary less than one month and was still in orientation. Regardless, it again seems whether Dr. DeGracia's conduct under the circumstances was reasonable, negligent, or deliberately indifferent to the condition of Mr. Jones is a question of fact.

Only extreme examples of maltreatment are cognizable under the theories upon which the plaintiff is relying on. Nevertheless, as the Court noted in its previous order dated October 19, 1984 denying the defendant's motion for summary judgment, there is too much call for subjective analysis of intention, motive, knowledge, action, or inaction — all issues ripe for jury consideration based on its measure of credibility and candor. While the plaintiff must overcome a high standard of proof to succeed, the defendants cannot escape the fact that Mr. Jones was the fourth prisoner to die at the Terre Haute penitentiary in 1975. It would be premature for this Court to conclude, even with the thousands of pages of material including "new" evidence and case law submitted by counsel in support of the motion, that there is no other interpretation of the facts or that there are no genuine issues as to material facts in this case. On the contrary, there would appear to be serious disputes as to facts and the plaintiff is entitled to her day in court.

Furthermore, the Seventh Circuit recently addressed the credibility issue as it relates to summary judgment in *Stewart v. RCA Corporation*, Nos. 85-2626 & 85-2670, Slip Op. 244 (7th Cir. May 12, 1986), in which the Court of Appeals stated that "a judge may not assess the credibility of witnesses to decide a motion for summary judgment." The appellate court held that the lower court erred in resolving a factual dispute on a motion for summary judgment. The circumstances here are quite similar in view of the defendants' instant motion urging the Court to grant summary judgment in its favor, for the Court finds that there is a genuine issue of fact relating to Carlson's knowledge of the alleged medical maltreatment and of his subsequent acts. The same can be said of Drs. Brutsche and DeGracia.

QUALIFIED IMMUNITY

Many defendants who might otherwise be reached in *Bivens*-type actions are immunized from such suits. The immunities available are comparable to those available in suits brought under 42 U.S.C. §1983. *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Prison officials receive qualified immunity from liability in §1983 actions. *Procumer v. Navarette*, 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978). At bar, Carlson and Brutsche seek the Court to reconsider its earlier position on the issue of qualified immunity, for in a prior order dated October 19, 1984, this Court denied the defendants' assertion of qualified immunity and cited *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir. 1984) as authority.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the U. S. Supreme Court established an objective qualified immunity standard by stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818. Hence, *Harlow* discarded the prior subjective test which had been involved in the qualified immunity defense. From the above, the central focus rests upon the issue of whether the conduct complained of violated clearly established constitutional or statutory rights. *Harlow, supra*; *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984). If the law was clearly established at the time of the act that gave rise to the action, then ordinarily qualified immunity is not available as a defense. *Harlow, supra*. Thus prompting the Court to decide as a matter of law whether the constitutional right at issue - that the defendants were deliberately indifferent to the decedent's

medical needs - was clearly established as of August 1975.

Having examined the relevant case law regarding the established law in this circuit at the time in question, the Court finds that the deliberate indifference or willful neglect standard was clearly established in *Thomas v. Pate*, 493 F.2d 151 (7th Cir.), vacated and remanded on other grounds, 419 U.S. 813, 95 S.Ct. 288, 42 L.Ed.2d 39 (1974) (per curiam), which was decided prior to August of 1975, and later followed in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir. 1984). *Bass v. Wallenstein*, 769 F.2d 1173, 1186 (7th Cir. 1985).

With this determination having been made, the defense of qualified immunity ordinarily should fail since a reasonably competent public official is expected to know the law governing his conduct. *Harlow, supra.*, at 818-819. Extraordinary circumstances, however, may exist to allow an official to prove that he neither knew nor should have known of the relevant legal standard, and such a determination turns on objective factors. *Id.*

The defendants, in their elephantine brief, have attempted to sway the Court that Carlson and Brutsche should be given qualified immunity. This attempt has failed once and, for the reasons set forth in this opinion, must fail again.

Defendants' brief, while nevertheless being overly sized, has failed to convince the Court that extraordinary circumstances exist that would demonstrate that Carlson or Brutsche neither knew nor reasonably should have known of the relevant legal standard.

FIFTH AMENDMENT

The principal role of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). Likewise, the Fifth Amendment Due Process Clause contains an equal protection component which prohibits the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Hence, in order to prevail on an equal protection claim, a plaintiff must show that the defendants acted with a discriminatory purpose or intent. *Washington v. Davis, supra*. The discriminatory purpose or intent may be proven by showing a systematic exclusion of persons because of race or by showing an unequal application of a law, policy, or system to such an extent as to show intentional discrimination. *Washington v. Davis, supra* at 239.

In an equal protection case, a plaintiff is not required to show that the challenged action vested solely on racial discriminatory purposes, for a plaintiff must show that it was a motivating factor. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). In determining whether an invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such direct and circumstantial evidence of intent as may be available. *Id.*, 429 U.S. at 266. A finding of intentional discrimination must be based on a totality of the circumstances. *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

In the case at bar, plaintiff makes an equal protection claim that black prisoners were invidiously discriminated against by denying them appropriate medical care.

In so alleging, however, plaintiff has failed to adequately show a discriminatory purpose or intent. Plaintiff claims that an inmate's (David Saxner) affidavit and the statistical evidence that all four medical deaths involved black prisoners, constitutes a cognizable claim under the Fifth Amendment.

First of all, Saxner's affidavit is conclusory and contains bald allegations of the type that is not colorable under the Fifth Amendment. Saxner's strongest evidence of discrimination is directed at the prior prison doctor who is not a named party. Moreover, Saxner, a white inmate, claims that he was not allowed to see a doctor when the need arose, hence, inferring that such allegations are not motivated by an invidious discriminatory purpose. The fact that the four inmates who died were black merely goes to impact not intent. Therefore, for the foregoing reasons, plaintiff fails to state a cause of action under the Fifth Amendment.

Accordingly, the Court finds the theory of respondeat superior is inapplicable in this case. However, genuine issues of material fact exist as to the involvement of Mr. Carlson, Dr. Brutsche, and Dr. DeGracia in the circumstances surrounding Mr. Jones' death. The Court affirms its earlier order denying the defendants' assertion of qualified immunity as a defense. The Court GRANTS the defendants' motion for summary judgment as to Count III of the plaintiff's complaint relating to race discrimination finding that the plaintiff has failed to adequately show the defendants acted with a discriminatory purpose or intent. Finally, the Court DENIES the plaintiff's motion to strike the defendants' second motion for summary judgment finding that the defendants' motion, while overly long and somewhat repetitive, is not frivolous and was not filed in bad faith.

IT IS SO ORDERED this 2nd day of June, 1986.

/s/ Gene E. Brooks, Judge

Gene E. Brooks, Judge
United States District Court
Southern District of Indiana

cc: Distribution to all counsel of record.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 25, 1989

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

LINDA CLEVELAND-PERDUE,
Successor Representative and
Administratrix of the Estate
of JOSEPH JONES, JR. (a/k/a)
ROSCOE SIMMONS,

Plaintiff-Appellee,

No. 88-2513 vs.
ROBERT L. BRUTSCHE, M.D.,

Defendant-Appellant.

Appeal from the
United States District
Court for the Southern
District of Indiana,
Terre Haute Division.
No. 76-93 C

Gene E. Brooks, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on August 18, 1989, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Circuit Judge Frank H. Easterbrook did not participate in the considration or decision of this petition for rehearing *en banc*.

ORIGINAL

Supreme Court, U.S.
FILED
MAR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

RESPONSE REQUESTED

89-1167

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

ROBERT L. BRUTSCHE, M.D., Petitioner

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

PETITION TO PROCEED IN FORMA PAUPERIS

Now comes Respondent, Linda Cleveland-Perdue, by her undersigned counsel and respectfully requests, based upon the attached affidavit of counsel, leave to proceed in forma pauperis.

Michael E. Deutsch

MICHAEL E. DEUTSCH
G. FLINT TAYLOR
Attorneys for Respondent

Peoples Law Office
343 South Dearborn Street
Suite 1607
Chicago, Illinois 60604
(312) 663-5046

State of Illinois)
) SS:
County of Cook)

AFFIDAVIT

Michael E. Deutsch, being first duly sworn and under penalty of perjury states the following:

1) I am one of the attorneys for the Estate of Joseph Jones Jr. who died in 1975 while a prisoner at Terre Haute Prison.

2) The only asset of the estate is the prospective recovery from the civil rights action which is the subject of this appeal.

3) This case has been in litigation for over 13 years having been heard by this Court in 1980, Green v. Carlson, 446 U.S. 14 (1980) and on three occasions by the United States Court of Appeals for the Seventh Circuit. The estate was granted permission by this Court to proceed in forma pauperis on the prior occasion in 1980.

4. The estate has no monies for which to pay to prosecute this case and therefore it is requested that the estate and administratrix Linda Cleveland-Perdue be granted permission to proceed in forma pauperis.

Michael E Deutsch
A F F I A N T

Signed and sworn to
before me this 28th
day of March, 1990.

NOTARY PUBLIC

OFFICIAL SEAL
JOSE L. BERRIOS
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. AUG 3,1992

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

89-1167

ROBERT L. BRUTSCHE, M.D., Petitioner

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1) Did the District Court apply a standard different than "clearly established" in denying Petitioner qualified immunity?

2) Did the authoritative, consistent prior opinions of three Court of Appeals in four separate decisions as to the Eighth Amendment liability for systemic denial of medical care satisfy the "clearly established" standard?

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STATEMENT OF THE CASE

1) Procedural History

On June 18, 1976, Marie Green, the mother of decedent Joseph Jones* and administratrix of his estate,** filed a Bivens action in the Southern District of Indiana seeking damages against Bureau of Prisons Director Norman Carlson, Bureau of Prisons Medical Director Dr. Robert Brutsche, and Terre Haute Prison doctor Benjamin DeGracias*** under the Fifth and Eighth Amendments for their deliberate indifference to her son's serious medical needs, which caused his death in August of 1975.

In January of 1977, the District Court dismissed Plaintiff's complaint, holding that Indiana wrongful death law applied, thereby limiting decedent's damages to burial expenses and precluding satisfaction of the $10,000.00 jurisdictional amount. The Seventh Circuit reversed, establishing a federal common-law right of survivorship. Carlson v. Green, 581 F.2d 669 (7th Cir. 1978). The Defendants then appealed this ruling to the Supreme Court, raising for the first time the argument that the Federal Tort Claims Act pre-empted the field and barred a Bivens action for Plaintiff's injuries. This Court, after expressly adopting the holdings of the lower courts that Plaintiff's complaint sufficiently alleged a deliberate indifference claim, found a right to bring this claim directly under the Eighth Amendment, and affirmed the Seventh Circuit's recognition of the federal common-law right of survivorship. Carlson v. Green, 446 U.S. 14 (1980).

The matter was remanded to the District Court for discovery and trial, and the United States Attorney for the Southern

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*While Plaintiff-decedent's given name is Joseph Jones, he was known within the Bureau of Prisons system as Roscoe Simmons.

**After waiting 12 years to have her day in Court, Ms. Green died in the summer of 1988. The mother of two of Joseph Jones' children, Linda Cleveland Perdue, has replaced Ms. Green as the administratrix.

***Plaintiff also sued other prison employees and the Joint Commission on Hospital Accredidation who are no longer parties in this case.

District of Indiana was replaced by three separate privately retained and publicly renumerated law firms, who proceeded to initiate an extensive process of discovery. After the vast majority of discovery was completed, the Defendants filed a voluminous motion, brief and appendix for summary judgment and qualiified immunity. On October 19, 1984, the District Court denied Defendants' motion in total.

The District Court then ordered the case to proceed to trial on October 31, 1984. After first filing a notice of appeal as to the District Court's qualified immunity ruling, Defendants Carlson, Brutsche and DeGracias then entered into a settlement with Plaintiff, agreeing to pay decedent's estate $150,000 on the condition precedent that their principals -- the Justice Department -- implement a regulation providing for indemnification of federal employees acting within the course of their employment. As part of this agreement, Defendants withdrew their appeal of the qualified immunity ruling and Plaintiff agreed to continue the trial for a one year period to allow for the implementationn of the indemnity regulation.

When the Justice Department failed to implement the anticipated regulation, the matter was reset for trial in March of 1986. On the eve of this second trial date, Defendants filed a second motion for summary judgment and qualified immunity, which was almost identical to the first motion and which incorporated no significant factual matter which was not already raised in Defendant's first motion. On June 2, 1986 the District Court again denied Defendants' request for qualified immunity.

The Defendants, utilizing the Cohen-Mitchell* collateral order doctrine, brought an interlocutory appeal from this second denial of qualified immunity, and on appeal the Seventh Circuit determined that the case should be remanded to the District Court for the enumeration of more specific factual findings, disputed and undisputed, which formed the basis for

*Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and Mitchell v. Forsyth, 472 U.S. 511 (1985).

the denial of qualified immunity. Green v. Carlson, 826 F.2d 647 (7th Cir. 1987).

On July 5, 1988, the District Court entered a 29 page order enumerating the specific disputed and non-disputed facts upon which the Court based its qualified immunity determination. In its ruling, the Court held that Defendant Norman Carlson was entitled to qualified immunity, but, for the third time, determined that Defendants Drs. Robert Brutsche and Benjamin DeGracias were not so entitled. Defendant Brutsche then brought another pretrial qualified immunity appeal,* and the Seventh Circuit, applying the District Court's findings, upheld the determination that Defendant Brutsche's conduct violated a clearly established right under the Eighth Amendment to be free from deliberate indifference to serious medical needs. Cleveland-Perdue v. Brutsche, 881 F.2d 427 (7th Cir. 1989).

2) STATEMENT OF FACTS**

On August 14, 1975 Plaintiff-decedent Joseph Jones, Jr. suffered a serious asthma attack while confined in the infirmary at Terre Haute prison. His condition worsened over the next six hours and the Physician's Assistant (PA) on duty, William Walter, made repeated requests to the prison doctor, Defendant Benjamin DeGracias, to return to the institution from his home five minutes away or to order the patient transferred to an outside hospital emergency room. DeGracias refused to follow either course. (App. B-9-10, App. A-3) Instead, after Plaintiff-decedent became progressively more agitated from his inability to obtain oxygen, DeGracias ordered over the telephone, without examining the patient, the injection of 200 m.g.

*Defendant Dr. DeGracias did not appeal this ruling from the District Court.

**The facts enumerated in this Statement are based in substantial part on the findings of the District Court in its second denial of summary judgment and qualified immunity for Petitioner Brutsche [found in Appendix B to Brutsche's Petition for Certiorari (App. B)] and the second immunity opinion of the Court of Appeals for the Seventh Circuit [found at 881 F.2d 427 and in Appendix A to Brutsche's Petition (App. A)]. The additional facts cited in this Statement are contained in the record of the case, including depositions and affidavits. All citations to the Appendix are to Petitioner's Appendix.

of Thorazine, a powerful depressant drug, directly contra-indicated for someone in Joseph Jones' condition. Almost immediately thereafter, Jones suffered respiratory arrest and only after PA Walter so informed Dr. DeGracias and again urged him to return to the prison, did he come, ten to fifteen minutes later. (App. B-9-10, App. A-3) By then it was too late, and Joseph Jones could not be revived.

Beginning eight months earlier with the death of prisoner William Lowe on January 6, 1975, specific and serious inadequacies with the delivery of emergency medical care at Terre Haute prison were brought to the attention of Defendant-Petitioner Dr. Robert Brutsche, who was the Medical Director of the Bureau of Prisons.

At the time of Lowe's death, the only full-time doctor at the prison* was Dr. Silverman, hired by Defendant Brutsche at the age of 72. Prior to Lowe's death, Brutsche knew Silverman had become enfeebled. (App. B-3, App. A-3)

On January 4, 1975, Lowe had been admitted to the prison infirmary and diagnosed by a Physician's Assistant as having pneumonia. (App. B-3) That same day, Silverman prescribed Demerol over the telephone without examining patient Lowe. When the Physician's Assistant suggested that such a drug was inappropriate, Silverman agreed and rescinded his order. (App. B-3, A-4) On the 6th, however, when Lowe's condition worsened, Silverman was again called on the telephone and the Physician's Assistant recommended that Lowe be moved to the local hospital. Silverman initially agreed, but before Lowe could be moved, Silverman called back and ordered Lowe be kept at the penitentiary, and that Lowe be administered Demerol. The Demerol was administered at approximately 6:05 a.m., and Lowe stopped breathing at 6:15 a.m. (App. B-3, A-2)

In light of the highly irregular circumstances of Lowe's death, as well as a prison-wide work stoppage protesting the inadequate medical care at Terre Haute, Defendant Brutsche was

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*Previously there had been two full time doctors.

immediately dispatched to the prison to conduct an investigation. (App. B-4)

During his investigation into Lowe's death, Defendant Brutsche did not interview any prisoners, despite the fact that they had made numerous complaints about medical care and several had specific information about Lowe's death. (App. B4) Nor is there any clear evidence that he talked to Physician's Assistant Snowden who was present during the last few hours prior to Lowe's death (App. B-4)

The medical facility at Terre Haute was not adequately staffed or equipped. Much of the work in the infirmary was performed by inmate nurses who were not trained in either the basics of nursing care or rudimentary principles of sanitation. (Affidavit of Physician Assistant William Walter) The prison infirmary had a laboratory, staffed by an inmate, capable of performing only the most rudimentary procedures.* The prison infirmary did not have access to any written protocols or guidelines regarding the treatment of seriously ill patients, including asthmatics. (Affidavit of William Walter)

After Lowe's death, Defendant Brutsche did recommend that Silverman, who he learned was suffering from "cerebral arteriosclerosis" and was taking valium for depression, (App. B-4, A-2) be asked to resign; however, he intentionally prepared no written report of the systemic breakdown suggested by Lowe's death (App. B-5)

Although Brutsche recognized the structural problems in the delivery of emergency medical care raised by the death of William Lowe, Brutsche instituted no substantive changes in hospital procedures, staffing, or training after Lowe's death. (App. B-5)

Likewise, he made no changes in the procedures or criteria for doctors to respond to emergency calls, for the emergency

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*Most specifically, it had no equipment for measuring blood gases, which was an important test where patients were suffering from respiratory disorders, as were Lowe, McCain and plaintiff-decedent.

transfer of prisoners to an outside hospital, or for administering drugs over the telephone. Nor did Brutsche, despite the obvious incompetency of Dr. Silverman, establish criteria and procedures for evaluating a staff physician's performance. (App. B-8)

The only two written recommendations made by Defendant Brutsche after his investigation of Lowe's death concerned more careful recordkeeping, i.e. proper recording of progress notes on in-patients and a kardex system to keep information on patients. (App. B-5, A-3) Moreover, Brutsche took no steps to see that these minimal recommendations were implemented (App. B-5, A-3) and the record keeping recommendations had not been instituted at the time of Plaintiff-decedent's death.

For seven months after Silverman's resignation, the prison was left without a full-time doctor; Dr. Brutsche knew and approved of this. (App. B-12) Specific complaints and official inquiries concerning the delivery of medical care at Terre Haute continued to be made, and were brought to the attention of Dr. Brutsche and BOP Director Carlson. Carlson's office, with Brutsche's acquiescence, replied to these complaints and inquiries, including those by members of Congress, by saying that all the problems at Terre Haute prison infirmary had been resolved by Brutsche's investigation, and that a full time physician was on staff on Terre Haute. Neither of these representations were, to say the least, accurate. (App. B-5)

Brutsche was also made aware of the emergency medical care inadequacies at the Terre Haute infirmary by the recommendations of the Joint Commission on Accreditation of Hospitals. The Joint Commission awarded the Terre Haute prison hospital a limited one year accreditation in November, 1974, because it found that the hospital needed to improve the administration and delivery of emergency medical care. (App. B-5-6)

Further, Defendant Brutsche was informed of two deaths of prisoners at Terre Haute after the death of Lowe: Frederick McCain on April 10, 1975 and Robert Graham June 8, 1975.

Despite the serious medical condition of both these prisoners, neither was provided access to a doctor at the prison prior to their death. Without visiting the institution after either death, Brutsche nonetheless concluded that adequate medical care was provided to both men. (App. A-3, B-7-8) Brutsche failed to prepare a written report of these deaths nor were any steps taken to insure that seriously ill patients were promptly seen by a physician. (App. B-7-8)

In August of 1975, Brutsche hired Defendant Benjamin DeGracias as the full-time staff physician for Terre Haute. Prior to his hiring of DeGracias, Defendant Brutsche had not instituted any written procedures for hiring or evaluating new doctors. (App. B-8)

Dr. DeGracias reported for work on August 3, 1975. At the time he was hired, DeGracias received no orientation from Brutsche or his office, nor was he provided with any materials which explained his obligation to be available during off-duty hours or the relative responsibilities between himself and the Physician's Assistants. (App. B-11) In fact, Defendant Brutsche did not explain in detail the relationship between the Physician's Assistant and physician to Defendant DeGracias until eight days after Jones' death.

Despite the failure to use the outside emergency medical services in the death of William Lowe, Brutsche also had failed to establish any written procedures for referring a prisoner to an outside hospital. Consequently, DeGracias was not informed of any written guidelines concerning the availability and use of such outside medical facilities. (App. B-11). Since Brutsche had failed to write evaluative reports concerning the deaths of Lowe, Graham and McCain, there was no documentation to be made available to DeGracias concerning the previously identified problem areas in the delivery of emergency medical care. DeGracias was neither cautioned about nor directed to desist from ordering over the telephone the administration of drugs without examining the patient. (Deposition of DeGracias)

Since the staffing problems had not been addressed after Lowe's death, Physician's Assistant Walter was the only medical staff person on duty throughout the entire night shift. Besides attending to Joseph Jones who was suffering from a serious asthma attack, he had to perform other duties, including dispensing of medication to the other patients in the infirmary. In addition, Walter had no formalized training, was given no special courses on emergency medical care, nor was he even trained to recognize patients who suffered from lack of oxygen or to differentiate them from those who were merely agitated. (Affidavit of William Walter)

After Joseph Jones' death, Brutsche finally issued a list of recommendations to the Warden, including the keeping of full in-patient medical records on anyone admitted to the prison hospital; the more liberal utilization of outside hospital facilities; the taking of steps to encourage better communication among the staff; the review of all "problem" cases; and the establishment of a policy concerning the availability of physicians during off-duty hours. (App. A-23, A-31)

As stated in the expert opinion of Dr. Robert Cohen, then the administrator of Health Services for the New York Department of Corrections, the circumstances surrounding the death of William Lowe, coupled with the subsequent death of Francis McCain and Robert Graham,

> ...established the presence of critical failures and deficiences in the structure and functioning of the health care delivery system which were obvious, potentially life threatening, and which were not remedied prior to the death of decedent Joseph Jones...
>
> (Affidavit of Dr. Robert Cohen)

Based upon these facts, the Appeals Court below found that the district court had determined, with regard to Brutsche, that there were several disputed issues that precluded the entry of summary judgment in his favor on the issue of qualified immunity, including:

> (1) whether the physician's assistants were adequately trained; (2) whether DeGracias had received any instruction about transporting seriously ill

prisoners to area hospitals; (3) whether Brutsche had conducted a thorough investigation after the first death at the prison hospital; (4) whether the fact that the record-keeping recommendations were not implemented prior to Jones' death reflected on Brutsche's liability and (5) whether Brutsche should have implemented a policy concerning the need for physicians to come to the hospital to examine prisoners facing life-threatening conditions in the wake of Lowe's death.

(App. A-4)

REASONS FOR DENYING THE WRIT

1) The opinion of the Seventh Circuit does not conflict with the "clearly established" qualified immunity standard created by this Court, does not conflict with a ruling of any other Court of Appeals, nor does it create a new qualified immunity standard. Moreover, the opinion does not create a confusing test for granting qualified immunity to public officials nor would review by this Court further clarify the law of qualified immunity.

2) The Seventh Circuit's decision that Dr. Brutsche's conduct violated clearly established law was a correct determination; additionally, it is a fact specific ruling, of which review by this Court would be of little value to other public officials.

I.

The Court of Appeals below, relying on the extensive findings of the District Court, engaged in a detailed analysis of the issue of qualified immunity as it applied to the specific facts of this case and the particular defendant who raised it. The District Court had rejected this claim of immunity on the basis of the Seventh Circuit decision in Thomas v. Pate, 493 F.2d 151 (7th Cir. 1975); see also Joseph v. Brierton, 739 F.2d 1244 (7th Cir. 1984), which, prior to plaintiff's death, clearly established the right of a prisoner to be free from deliberate indifference to serious medical needs. The Court of Appeals below, however, applied this Court's holding in Anderson v. Creighton, 483 U.S. 635 (1987), and made a more specific and expanded inquiry than that made by the District Court to determine whether the right was clearly established in light of

Defendant Brutsche's particular conduct. In so doing, it examined relevant case law to determine whether the right to be free from systemic deliberate indifference in the delivery of medical care, as alleged and demonstrated by the plaintiff here against Brutsche, was clearly established.

Determining that there was no Supreme Court or Seventh Circuit decision which controlled the question, it turned to decisions by other Courts of Appeals in order to determine whether the particularized legal right in question was clearly established.

This method of determining whether the relevant law was "clearly established" is entirely consistent with the language and practice of this Court, as well as several Courts of Appeals, in making such immunity determinations. In Procunier v. Navarette, 434 U.S. 555 (1977), this Court, for the first time used "clearly established" terminology in defining the objective qualified immunity standard. In so doing, it acknowledged that this determination could be made with "reference to the opinions of this Court, of the Courts of Appeals or the local District Court," 434 U.S. 565, and examined the issue raised by the defendant in light of previous decisions by the local District Court and various Courts of Appeals, and a subsequent decision by this Court. 434 U.S. at 563-4. In Harlow v. Fitzgerald, 457 U.S. 800, 818, 818, note 12 (1982), this Court, quoting Procunier, refused to go further into how the "state of law" was to be "'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or the local district court'", but instead left that up to the lower court's discretion. Subsequently, in Mitchell v. Forsyth, the Court again turned, inter alia, to several conflicting District Court decisions to determine that the right in question was not clearly established. cf. Davis v. Scherer, 468 U.S. 183 (1984).*

*In Davis , this Court determined that statute and regulation could also clearly establish the right if, and only if, the statute provided the basis for the cause of action sued upon.

In conformance with Procunier, Harlow, Mitchell, and Anderson, several Courts of Appeals have determined that, in the absence of controlling decisions by this Court or by the Court of Appeals in the jurisdiction where the alleged violation took place, a Court should look to whatever desisional law is available to ascertain whether the law is clearly established under Harlow. Rakovich v. Wade, 850 F.2d 1180, 1209 (7th Cir. 1988); Capoeman v. Reid, 754 F.2d 1512, 1514 (9th Cir. 1985) (reviews decisions in "another circuit, various district courts and state courts"); Ricci v. Bankshares of Maine, Inc., 768 F.2d 456 (1st Cir. 1985) (examines other Circuit Courts of Appeals to determine "nationwide precedent" in the absence of a controlling First Circuit decision); Bilbery by Bilbery v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984).

The Court of Appeals below therefore correctly followed the clear teachings and practice of this Court and several Courts of Appeals when it looked to decisions by other Courts of Appeals to determine that, at the time of plaintiff's death, "a clear consensus had been reached indicating that a prison official's failure to remedy systemic deficiencies in the medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs." (App. A-7)

The alternative language in the Seventh Circuit opinion, "whether there was a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time", (App. A7) simply further defines the "clear consensus" language, and does not create a different test than "clearly established." This language merely states the recognized and logical principle, that even in the absence of a binding precedent in the Supreme Court or the specific Court of Appeals in which the case arises, authoritative and consistent decisions determining the same legal rights by coordinate Courts of Appeals, also create clearly established law. This principle,which allows for a

determination of "clearly established" by reference to consistent decisions by other Courts of Appeals, does not create a new standard, nor does it allow for uncertainty or inhibit public officials from carrying out their official responsibilities. Furthermore, contrary to the Petitioner's claim, the Court of Appeals decision below does not require a defendant to predict future development in the law, but rather only to follow what the uncontradicted federal Constitutional law was at the time.

Moreover, the decision of the Court of Appeals for the D.C. Circuit in Zwiebon v. Mitchell, 720 F.2d 162 (D.C. 1983) cert. denied, 469 U.S. 880 (1984), (Zwiebon IV) is not in conflict with the decision here.

In an earlier Zwiebon decision, the D.C. Circuit had held its determination that the defendant's conduct was unconstitutional was retroactive because it was "clearly foreshadowed" by prior decisions. [See Zwiebon III, 606 F.2d 1172 (D.C. Cir. 1979), applying retroactively the decision in Zwiebon I, 516 F.2d 594 (D.C. Cir. 1975).] In making its clearly foreshadowed determination, the D.C. Circuit relied upon two prior decisions from other district courts which found similar coniduct to be unconstitutional. In Zwiebon IV, the plaintiff attempted to invoke the prior retroactivity determination to defeat the defendant's qualified immunity claim, arguing that "clearly foreshadowed" was coterminous with "clearly established". The D.C. Circuit rejected this argument, noting that at least five other prior district court decisions contradicted the two which had condemned similar conduct as unconstitutional:

> Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

Zwiebon IV, 720 F.2d at 173, citing Zwiebon III, 606 F.2d at

1181 nt.49.*

Therefore, in this case the use of "clear consensus" and "clear trend" language in no way equates with the application of the less stringent "clearly foreshadowed" test. Here, the Seventh Circuit relied on four Court of Appeals decisions, which were uncontradicted by any other decisions,** and which were subsequently adopted in several additional Circuits, including the Seventh Circuit itself, while in Zwiebon the contradictory district court decisions precluded a finding of clear consensus (i.e.: clearly established), while supporting a determination of clearly foreshadowed.

II.

The law was clearly established by the authoritative decisions of three Courts of Appeals in four separate decisions*** that systemic deficiences in the delivery of medical care constitute violations of the Eighth Amendment. Thus, the question of whether the conduct of Petitioner Brutsche in

*Other Courts of Appeals have also distinguished by definition these obviously different standards. See, e.g., U.S. v. Blake, 632 F.2d 731 (9th Cir. 1980), where the Ninth Circuit found the clearly foreshadowed test to be satisfied where the courts had persistently avoided the question sought to be applied retroactively or there was "some drift" towards establishing the issue in question. See also Acoff v. Ashton, 762 F.2d 1543 (11th Cir. 1985).

**Reliance on the definitive rulings of other Courts of Appeals is particularly appropriate in this case where the public official who seeks immunity administered a nationwide medical system with institutions under the jurisdiction of the particular Courts of Appeals from which the definitive rulings emanate. It would certainly be an anomalous and patently unfair if a public official in Dr. Brutsche's position were able to cloak himself with immunity because the decedent died in a prison governed by a Court of Appeals which had not yet decided a case concerning the systemic denial of emergency medical care, rather than in another Federal Prison, such as those located in Springfield, Missouri, Atlanta, Georgia, or Danbury, Connecticut, where the controlling Court of Appeals had established that the conduct in question violated the Eighth Amendment.

***See Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974) cert. denied, 421 U.S. 948 (1975); Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974); Stoneman v. Bishop, 508 F.2d 1224 (2d Cir. 1974) cert denied, 421 U.S. 948 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). As noted in several of those cases, this law was further clearly established by the underlying District Court decisions, and by previous decisions by various Courts of Appeals, including the Seventh Circuit, in cases where individual prisoners brought claims based on isolated instances of deliberate indifference to a particular inmate's serious medical needs.

failing to remedy the deficiencies in the delivery of emergency medical care at Terre Haute was sufficiently analogous to the conduct of the supervisory prison employees in those landmark Appeals Court cases, is a fact specific question which will have no significance beyond this particular case. Nonetheless, the Petitioner argues in Part II of his petition that this Court should grant his petition because "the case law did not put him on notice that his conduct was unlawful", particularly since he was a "distant administrator who had no responsibility for providing direct medical care." (Pet. p.13)

The authoritative principles set out in Finney v. Arkansas Board of Corrections, Bishop v. Stoneman, Gates v. Collier and Newman v. Alabama, and the fact patterns in those cases which were held to constitute Eighth Amendment violations, would indeed have put Dr. Brutsche on notice that his failure to take reasonable steps to remedy the gross inadequacies in the delivery of medical care at Terre Haute, constituted unconstitutional deliberate indifference. As recognized by the Court of Appeals below, systemic medical care deficiencies which denied inmates prompt, efficient examination, treatment or medication, which allowed for grossly inadequate staffing, training, and the absence of on site doctors, and which provided grossly inadequate emergency services, including transfer to outside hopsitals, were condemned as violations of the Eighth Amendment, Newman and Finney, while repeated failures to provide adequate care were condemned in Bishop. (App. A-7-8; see also Gates v. Collier.)

As further recognized by the Court below, these cases also informed a "reasonable person in Brutsche's position" of his obligation to take substantial steps to remedy these specific problems in order to cure the patent constitutional infirmities. (App. A-9) Nonetheless, Brutsche failed to take any substantive steps to first document and then address the obvious systemic problems with the delivery of emergency medical care at Terre Haute. He wrote no evaluative reports; he failed

to clarify the responsibility of the staff physician to report to the institution or to transfer a prisoner to an outside hospital; he failed to create a process for evaluating a doctor's performance or to establish procedures and criteria for hiring and orientating new doctors; and he failed to address the understaffing and training problems of prison medical employees. Such a complete failure to remedy these systemic deficiencies, despite notice, places his conduct well within the deliberate indifference standard established in Newman, Finney, Gates, and Bishop.

Nor can Brutsche's claim that he is without responsibility because he was a "distant supervisor" be credited. It was Brutsche who was empowered to conduct an investigation at Terre Haute following the death of William Lowe. It was Brutsche who chose not to write a report and to make only minimal cosmetic changes after Lowe's death, and it was Brutsche's alleged conclusion that everything was proper at Terre Haute that was cited in response to numerous continuing complaints about the medical care at Terre Haute. Further, it was Brutsche who, after the death of Joseph Jones, finally recommended some of the systemic changes which he had known were necessary at least since the death of prisoner Lowe some eight months earlier. While he may not have been in charge of "day to day" medical care at Terre Haute prison, as the chief medical officer he was certainly ultimately responsible for remedying systemic medical deficiencies, particularly when they were so extreme that he was put on notice of them in great particularity, and held himself out as responsible to remedy the problems.*

Focusing on the deprivation of care to plaintiff-decedent,

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*The Petitioner also argues that his purported status as a "high" government official should afford him greater protection than those with "less complex discretionary responsibilities" (Pet. at 18). This Court rejected this proposition in Anderson v. Creighton, stating that "we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties." 413 U.S. at 643. See also Kurowski v. Krajowski, 848 F.2d 764 (7th Cir. 1988).

the Petitioner also argues that plaintiff's evidence only raises "what level of medical care was unconstitutionally mandated" rather than the effective denial of medical care, (Pet. p.15), and cites one Court of Appeals and several District Court decisions which purportedly hold that such a "right" was not clearly established in August of 1975. This interpretation of the evidence impermissibly takes the facts in the light most favorable to the Petitioner, and is clearly disputed by plaintiff's evidence. The prison doctor's conscious failure to come to the infirmary to examine or treat the critically ill plaintiff, or to transfer him to a competent hospital despite the pleas of the attending Physician's Assistant to do so, and his telephone prescription of a contraindicated drug for purposes of control rather than treatment, constitute a denial of medical care, regardless of whether the plaintiff-decedent had been given treatment in the past.

In 1974 the Seventh Circuit held in Thomas v. Pate, 493 F.2d at 158, that a claim for deliberate indifference to serious medical needs is sufficient under the Eighth Amendment if "the medical care provided is so clearly inadequate as to amount to a refusal to provide essential medical care or so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." The facts here fall squarely under the Thomas definition, rather than under the Court of Apeals and District Court decisions offered by the Petitioner on the issue of level of medical care. Moreover, the cases relied on by Petitioner concern individual prisoner's claims, based on isolated instances, rather than systemic medical problems. If, as the Petitioner argues, such individual cases are to be relied upon in order to determine the status of the right in question here, then the Seventh Circuit's decision in Thomas v. Pate controls. Therefore, the cases cited by the Petitioner do not alter the clearly esta-

blished determination of the Courts below.*

CONCLUSION

As shown above, there is no reason for this Court to review the Court's decision below, as it properly applied the clearly established test, rather than adopting a lower standard; for this reason there is no conflict between the Seventh and D.C. Circuits on this issue. Moreover, the actual determination made by the Court below was fact specific, was amply supported by the undisputed and disputed facts, and by the pertinent Appellate Court decisions.

Further, a grant of certiorari will create additional unnecessary hardship for decedent's heirs, and further delay their day in court. This case is over 14 years old, and has already been heard once by this Court, and three times by the Court of Appeals yet still awaits trial. The estate has no money to contribute to the considerable expense of litigation. Rather than submit to trial, Petitioner has chosen a strategy of delay, which has included the filing of repetitive qualified immunity motions to resurrect his waived interlocutory appeal. Surely civil rights litigants have a basic right to have their complaints heard in an expeditious manner without seemingly interminable procedural delays and serialized appeals by publicly financed private lawyers. This right is equally as important as that of public officials to be protected from non substantial lawsuits, see generally Owen v. City of Independence, 445 U.S. 622, 651 (1988); Smith v. Wade, 461 U.S. 30,

*The Petitioner also asserts it is "truly curious" that the Court of Appeals below found the right to be clearly established when the District Court "twice failed to discern any such obstensibly clear law" and an earlier Seventh Circuit panel had "opined" after a "cursory review of the undisputed facts", and "based solely on those facts, Carlson and Brutsche may be entitled to qualified immunity." (Pet. p.13) (emphasis added) In fact, the District Court found three separate times that the law was clearly established as to Brutsche, on the basis of Thomas v. Pate and Joseph v. Brierton, without considering the law as to systemic deficiencies. As to the Seventh Circuit, on this appeal it had, for the first time, detailed factual findings from the District Court, and it considered those findings, and the entire record, including the disputed facts, in order to make its decision. Moreover, the same judge wrote both decisions, and none of the active judges on the Seventh Circuit voted to rehear the decision.

54-56 (1983); Carey v. Piphus, 435 U.S. 247, 254 (1978).

Accordingly, for all the above reasons, the defendant's Petition should be denied.

Respectfully submitted,

Dated: March 28, 1990

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CERTIFICATE OF SERVICE

I, Michael E. Deutsch, a member of the bar of the Court, hereby certify that I served the following party with the Petition to Proceed in Forma Pauperis and the Brief in Answer to the Petition for Certiorari by placing a copy of same in U.S. Mail, postage prepaid, at 343 S. Dearborn, Chicago, IL on March 28, 1990 before 5 o'clock p.m..

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(3)

No. 89-1167

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In The
Supreme Court of the United States
October Term, 1989

ROBERT L. BRUTSCHE, M.D., Petitioner,

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 89-1167

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT L. BRUTSCHE, M.D., Petitioner,

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

Respondent, Linda Cleveland-Perdue, misstates the record and the district court's findings in the Statement of Facts in her Brief in Opposition. In addition, Perdue relies upon a Seventh Circuit case vacated by this Court. Respondent's Brief in Opposition, p. 16 (citing *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *vacated sub nom., Cannon v. Thomas*, 419 U.S. 813).

I.

RESPONDENT'S STATEMENT OF FACTS CONTAINS MISSTATMENTS OF FACTS NOT SUPPORTED BY THE RECORD OR BY THE DISTRICT COURT'S FINDINGS

Although reply briefs are limited by Rule 15.6, Rules of the Supreme Court of the United States, to arguments first raised

in the brief in opposition, Perdue's Statement of Facts contains statements unsupported by the district court's opinion or the record. Perdue did not point out any misstatement of fact in Dr. Brutsche's petition as requested by Rule 15.1, but rather restated the facts with baseless statements that merit correction.[1] A number of examples where Perdue has mischaracterized the record or the district court's opinion follow.

Perdue suggests that Dr. Brutsche approved of the lack of a full-time physician after Silverman's resignation. She argues, " For seven months after Dr. Silverman's resignation, the prison was left without a full-time doctor; Dr. Brutsche knew and approved of this. (App. B-12)" Respondent's Brief in Opposition, p.6. The undisputed facts as found by the district court contradict Perdue's contention that Dr. Brutsche approved of the situation. The facts indicate it was difficult to find doctors

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1 In addition to groundless statements in the Statement of Facts, Perdue's Statement of the Case has irrelevant statements. First, Perdue's statement regarding a proposed settlement of the lawsuit is irrelevant:

> Defendants Carlson, Brutsche and DeGracias then entered into a settlement with Plaintiff, agreeing to pay decedent's estate $150,000 on the condition precedent that their principals — the Justice Department — implement a regulation providing for indemnification of federal employees acting within the course of their employment.

Respondent's Brief in Opposition, p. 2. This Court should disregard the statement as irrelevant to the legal issue of whether Dr. Brutsche is entitled to qualified immunity. *See* Rule 408, Federal Rules of Evidence. Second, Perdue points out that following remand from this Court, "the United States Attorney for the Southern District of Indiana was replaced by three separate privately retained and publicly renumerated [sic] law firms." Respondent's Brief in Opposition, pp. 1-2. This statement is immaterial to the appeal.

who would accept a full-time position at the prison:

> At the time of the first significant incident in this case, the death of William Lowe, there was one full time physician, Dr. Silverman, employed at the Terre Haute prison instead of the usual two. This was because the expiration of the draft, low salaries, and the unappealing nature of the work make it difficult to hire a physician. Instead, the second physician "slot" was filled by five rotating physicians.

Appendix to Petition for Writ of Certiorari ("App.") B-2. The district court found that after Dr. Silverman's resignation, the five rotating physicians stepped up their responsibilities. App. B-4. During the interim period:

> Brutsche began looking for a full time physician to replace Silverman by advertising, contacting the Civil Service, and seeking assignment from the Public Health Service.

App. B-6. Dr. Brutsche did not approve of the absence of a full-time physician; it simply was that no physician was available to be hired full-time.

Perdue misstates the record and the district court's findings by implying that Dr. Brutsche had a duty to write a written report. She further misstates the facts by claiming that Dr. Brutsche intentionally prepared no written report on his investigation in January, 1975:

> [Dr. Brutsche] intentionally prepared no written report of the systemic breakdown suggested by Lowe's death[.] (App. B-5) Although Brutsche recognized the structural problems in the delivery of emergency medical care raised by the death of William Lowe, Brutsche instituted no substantive changes in hospital procedures, staffing, or training after Lowe's death. (App. B-5)

Respondent's Brief in Opposition, p. 5. Perdue cites to page 5 of the district court's opinion.

The district court's opinion contradicts the statements that Dr. Brutsche "intentionally prepared no written reports" or that "Brutsche recognized the structural problems in the delivery

of emergency medical care. . . [and] instituted no substantive changes. . .". The district court's opinion, on the page cited by Perdue, states:

> About two weeks after Lowe's death, and as a result of his investigation, Brutsche issued a "Memorandum" to all Regional Administrators for Medical Services in the Bureau of Prisons. He recommended the maintenance of a nursing "kardex" to strengthen record keeping. A week later he issued a second "Memorandum" which essentially explained their function and gave instructions as to who should keep them and how they should be kept. This is apparently the extent of the changes Brutsche recommended in writing, as a result of Lowe's death. No written report was submitted by Brutsche to Carlson, although Brutsche verbally informed Carlson of his findings and it is not clear whether a written report was the normal procedure.

App. B-5. Neither the district court's opinion nor the record support Perdue's claim that Dr. Brutsche failed to institute changes or intentionally prepared no written report.

Perdue also misstates the record by making general statements that omit to inform this Court of facts detrimental to her case. She states, "The medical facility at Terre Haute was not adequately staffed or equipped," Respondent's Brief in Opposition, p. 5, thereafter arguing that the medical care was provided by inmate nurses. Perdue fails to inform this Court that the prison had five doctors available to provide medical services in addition to other specialists, such as an orthopedist, an optometrist, an oral surgeon, an anesthesiologist, an audiometrist, a neurologist, a urologist, a radiologist, an ophthalmologist, a dermatologist, an x-ray technician, a laboratory technician, a pharmacist, and a surgeon, who were available as needed. App. B-4; Affidavit of Mark O. Thompson, October 2, 1984, Exhibit B.

Perdue also suggests that it was Dr. Brutsche's duty to establish criteria and procedures for evaluating a staff physician's performance. Respondent's Brief in Opposition, p. 6. That duty belonged to the Regional Administrators for Medical Services (RAMS) and the warden of the particular prison. The

warden at the Terre Haute facility, Charles L. Benson, stated:

> Brutsche, himself, did not have any direct responsibilities, in 1975, for the daily direct administration of medical care to inmates at the USP-Terre Haute, nor did Brutsche have any hands-on role regarding the care specifically provided to an inmate on the doctor-to-patient level, such direct physician-to-patient services then being the responsibility of the chief of health services or other physicians and/or physicians' assistants at the USP-Terre Haute.

Affidavit of Charles L. Benson, September 23, 1984, p. 3.

The district court also noted that Dr. Brutsche did not have responsibility for the daily administration of medical care. App. B-2. Under Dr. Brutsche, the district court found there was a Deputy Medical Director and five RAMS along with a Chief Physician and Hospital Administrator at each prison. App. B-2. The Chief Physician was responsible for the professional medical care of the inmates and the Hospital Administrator was responsible for the management of the hospital administrative functions. App. B-2. Both the Chief Physician and the Hospital Administrator worked directly under the authority of the Warden. App. B-2.

Perdue claims that Dr. Brutsche did not establish written procedures for referring prisoners to outside facilities. Respondent's Brief in Opposition, p. 7. Initially, it should be noted that it was not Dr. Brutsche's duty to do so. In any event, a copy of the minutes of the medical staff meeting held on February 26, 1975, a month after William Lowe's death and seven months before Jones' death, which was sent to the prison doctors and the physicians' assistants (PA's), showed that written procedures were in effect to refer prisoners to outside facilities:

> The Warden also stated that if the PA feels a patient should be sent to the hospital after duty hours or on weekends, the PA should call an ambulance and send the patient to town. He hopes the PA would not overreact, but he would rather have the patient sent to the hospital and returned if we have to. Dr. Freed agreed and added that the PA should call the doctor and notify the hospital.

Affidavit of Charles L. Benson, September 23, 1984, Exhibit 1. There was also an update of a full-page memorandum setting forth emergency procedures entitled "Special Procedures To Be Followed in Case of Serious Medical Emergency After Hours" that went into effective on August 11, 1975, before Jones' death on August 14, 1975. Affidavit of Mark O. Thompson, October 2, 1984, Exhibit H; Affidavit of John W. Smith, September 26, 1984, Exhibit B; Affidavit of Edward Griffin, September 28, 1984, Exhibit A; Affidavit of Johnny Copher, September 27, 1984, Exhibit L.

Because of these misstatements and others, Perdue's Statement of Facts lacks the objectivity necessary to assist this Court in the resolution of the legal issue. Dr. Brutsche refers this Court to the district court's opinion to discover the facts material to the consideration of Dr. Brutsche's entitlement to qualified immunity.

II.

THE CHALLENGE TO THE SEVENTH CIRCUIT'S ADOPTION OF THE "CLEAR TREND" TEST FOR QUALIFIED IMMUNITY DID NOT QUESTION THE SEVENTH CIRCUIT'S USE OF VALID CASES OUTSIDE OF ITS JURISDICTION TO DECIDE WHETHER THE CONSTITUTIONAL RIGHT WAS "CLEARLY ESTABLISHED"

Perdue argues that the Seventh Circuit's decision to review other cases, when no Supreme Court or Seventh Circuit decision controlled, was consistent with the "clearly established" test of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Respondent's Brief of Opposition, pp. 10-11. Dr. Brutsche does not challenge the Seventh Circuit's decision to look to other law when there is no controlling law in the jurisdiction, rather Dr. Brutsche challenges the Seventh Circuit's reformulation of the "clearly established" test into the "clear trend" test. If the constitutional right at issue was "clearly established" consistently without any decisions to the contrary within other jurisdictions, then Dr. Brutsche would not be before this Court.

Perdue's argument begs the question of whether the Seventh

Circuit's "clear trend" approach to qualified immunity is consistent in principle with this Court's "clearly established" test of *Harlow*. The beginning of a trend towards the establishment of the right is simply not a clearly established right. The district court, after having reviewed the facts three times, concluded that the law was not clear:

> Another one of the many difficulties this Court has had with this case is that there is virtually no law granting qualified immunity to a defendant in a medical care/prison context. In other words, many cases have found defendants liable, thereby setting a liability floor, but none have set a ceiling by which this Court can judge the limits of the liability.

App. B-18. If a district judge, learned in the law, could not determine the limits of liability, then Dr. Brutsche, a medical doctor not trained in the law, would surely have difficulty determining whether his acts were unconstitutional.

The district court, as well as Perdue, relied upon *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *vacated sub nom., Cannon v. Thomas*, 419 U.S. 813. App. B-20; Respondent's Brief in Opposition, p. 16. The Seventh Circuit ruled the reliance on *Thomas v. Pate* was misplaced because it dealt with individual instances of deliberate indifference rather than systemic claims. App. A-7. Reliance on *Thomas v. Pate* is also misplaced because the case was vacated by this Court. Such an action indicates how unstable the law was in this area.

Perdue argues that the Seventh Circuit's decision does not require a government official to predict future developments in the law, but rather to follow the federal constitutional law at the time. Respondent's Brief in Opposition, p. 12. The fact remains, however, that a clear trend toward the establishment of a right is so unsettled as to thwart a public official's legitimate attempts to follow the constitutional law at the time. The caselaw in 1975 was not sufficiently settled to allow Dr. Brutsche to mold his conduct to conform with it. Thus, a clear trend developing constitutional rights cannot equal a clearly established right.

Perdue argues that this Court should deny a writ because

the case has no significance beyond these particular facts. Respondent's Brief in Opposition, pp. 9, 14. Every question of qualified immunity to some extent is fact-sensitive, but it does not follow that review by this Court would be of little value to other public officials. Changes in the qualified immunity test that throw public officials into a legal maze that judges trained in the law cannot solve affects all public officials. The qualified immunity test should be a definitive test that public officials ignorant of legal nuances should be able to clearly discern without jeopardy.

Finally, Perdue maintains that granting certiorari will delay trial. Respondent's Brief in Opposition, p. 17. The delay is a result of Perdue's attempt to sue improper parties.

III.

CONCLUSION

Petitioner, Robert L. Brutsche, M.D., respectfully requests that this Court grant his petition and issue a writ of certiorari.

Respectfully submitted,

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No. 89-1167

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner, Robert L. Brutsche, M.D., pursuant to Rule 15.7, Rules of the United States Supreme Court, submits this supplemental brief in response to the Brief for the United States as Amicus Curiae.

While agreeing that Dr. Brutsche's conduct in this case did not rise to the level of "deliberate indifference" required to establish an eighth amendment violation, the facts of this case being distinguishable from the facts of *Newman v. Alabama,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974); and *Bishop v. Stoneman,* 508 F.2d 1224 (2d Cir. 1974), Br. for United States 13-16, the United States nonetheless recommends that the petition for writ of certiorari be denied, thereby requiring Dr. Brutsche to confront a trial when the application of qualified immunity, which the United States otherwise agrees is appropriate, would preclude such an injustice. Moreover, even though the United States concedes that *Newman,*

Bishop, and *Finney* had merely *begun* to recognize that prison officials *generally* have a duty to provide a constitutionally adequate system for the delivery of inmate medical care, the United States noted that *none* of the cases upon which the Seventh Circuit relied focused on the particular level of responsibility of any individual prison official, or indicated, much less "clearly established," the minimum constitutional expectations for an official in Dr. Brutsche's position who was not responsible for the daily administration of inmate medical care and who had no direct authority over those (the warden, prison physicians, and prison hospital administrator) who were. Br. for United States 13-14.

The United States claims that the Seventh Circuit did not establish "an improper standard for determining whether, at the time of the acts in question, the governing law was clearly established," since "a right can be clearly established if there was in other courts a *sufficiently clear consensus* on the issue that the announcement of a controlling precedent was simply a question of time." Br. for United States 10 (emphasis supplied). Petitioner respectfully disagrees.

Where prior district and appellate court decisions in this very action evidence an inability among members of the judiciary to determine pre-existing law, it is untenable to require a lay public official to speculate as to a futuristic trend which might possibly result in a controlling precedent in order to ascertain "clearly established" law. The mere speculative anticipation of the possible future recognition of a constitutional right does not provide the basis for claiming that the right was clearly established.

I.

THE SEVENTH CIRCUIT'S "CLEAR TREND" TEST FOR QUALIFIED IMMUNITY CONFLICTS WITH THIS COURT'S TEST REQUIRING THE CONSTITUTIONAL RIGHT TO BE "CLEARLY ESTABLISHED"

Although the United States and Dr. Brutsche agree that the court of appeals' decision is erroneous, petitioner disagrees with the United States as to the source of the error. The government concludes that the error resulted from the incorrect application of a new, but proper standard. The error, however, arises from an unwarranted

modification, if not obfuscation, of this Court's qualified immunity standard. The Seventh Circuit's approach significantly limits, if not nullifies, qualified immunity in a manner inconsistent with *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987).

The court of appeals modified and restated this Court's test for qualified immunity, applying the following standard:

> In the absence of a controlling precedent we look to all relevant caselaw in an effort to determine whether at the time of the alleged acts a *sufficient consensus* had been reached indicating the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a *clear trend* in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.

Pet. App. A7 (emphasis added). The Seventh Circuit opinion states the standard in two different ways: "sufficient consensus" and "clear trend." The United States read the two statements into one "sufficiently clear consensus" test. Br. for United States 10.

The United States acknowledges that "this Court has never determined whether the law must be 'clearly established' by decisions of courts (federal or state, appellate or trial) in the same jurisdiction where the alleged unlawful events took place." Br. for United States 10. The United States argues it is appropriate to look to other jurisdictions in the absence of controlling precedent in this Court or the relevant court of appeals. Dr. Brutsche agrees provided that the law is (a) pre-existing, *Anderson,* 483 U.S. at 640 ("in the light of pre-existing law the unlawfulness [of an official's conduct] must be apparent"); (b) clearly established, *Harlow,* 457 U.S. at 818 (public official entitled to immunity unless actions violated "clearly established statutory or constitutional law of which a reasonable person would have known"); (c) particularized, *Anderson,* 483 U.S. at 640 ("contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"); and (d) "fact-specific," with a considerable degree of factual specificity so that an official can know whether his own conduct is unlawful, *id.* at 639-41. Br. for United States 9.

The Seventh Circuit's "sufficient consensus" or "clear trend" approach, as well as the United States' modified "sufficiently clear consensus" reading of the Seventh Circuit's approach, all suffer from one major flaw — they introduce the question of degree. How many cases are "sufficient" to constitute a consensus? When do a few scattered decisions become a trend? When do they become a clear trend? The strength of *Harlow* is that it drew a bright line: clearly established law. Allowing words of degree will impermissibly limit, if not negate, qualified immunity.[1]

The Seventh Circuit, in its opinion, used language from both the "sufficient consensus" test and the "clear trend" test. In application, however, the lower court used the latter test as indicated by the language in and holding of the Seventh Circuit's opinion. First, the court of appeals explicitly referred to a trend in the case law. The lower court stated:

> The trend established by *Newman, Finney* and *Stoneman,* has been followed by several other circuits. *See Inmates of Allegheny City Jail v. Pierce,* 612 F.2d 754 (3d Cir. 1979); *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir. 1982); *Ramos v. Lamm,* 639 F.2d 559 (10th Cir. 1980), *cert. den.,* 450 U.S. 1041 (1981); *Anderson v. City of Atlanta,* 778 F.2d 678, 686 at n.12 (11th Cir. 1985).

Pet. App. A8 n.5. The lower court had previously referred to its own circuit's opinion, *Wellman v. Faulkner,* 715 F.2d 269 (7th Cir. 1983), *cert. denied,* 468 U.S. 1217 (1984), as part of the trend. Pet. App. A7. Obviously, the Seventh Circuit conveniently seized upon *post-1979* decisions to justify its finding that there was clearly established law in 1975. The clear trend or sufficient consensus the Seventh Circuit specifically cited and relied upon to deny Dr. Brutsche immunity

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1 Use of the word "consensus" is less susceptible to varying interpretations. The dictionary defines the word to mean general agreement, unanimity, accord; collective opinion or judgment arrived at by most of those concerned. Websters Third Unabridged New International Dictionary 482 (1971). A consensus differs from a sufficient consensus or a clear trend.

did not develop until four years *after* the alleged unlawful acts.

Second, the proof that the Seventh Circuit applied the "clear trend" test is the result reached. The lower court concluded that the relevant case law amounted to a "sufficient consensus" even though both petitioner and amicus curiae agree that the case law did not amount to "clearly established" law under *Harlow* and *Anderson.* The Seventh Circuit's finding of a "sufficient consensus" or "clear trend" demonstrates how easily a court can look to future case law developments and then second-guess the public official. Hindsight was the Seventh Circuit's basis for denying qualified immunity, but cannot be allowed to sound the death knell to the doctrine.

With the benefit of the case law subsequent to *Finney, Bishop,* and *Newman,* the Seventh Circuit ruled that Dr. Brutsche should have known in 1975 that the constitutional right was "clearly established." When Dr. Brutsche was making his decisions in 1975, he did not have the benefit of knowing what the progeny of *Newman, Finney,* and *Bishop* would be. Furthermore, he did not know whether the nascent trend exemplified by the three factually distinguishable, if not inapplicable, cases was an inexorable development of the law, or one that would be reversed, modified, or remain constant. Only with hindsight could the Seventh Circuit know that *Newman, Finney,* and *Bishop* started a trend, that the trend would be affirmed, and that the trend would not change course. However, an "official cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette,* 434 U.S. 555, 562 (1978).

The Seventh Circuit's approach impermissibly allows judges to deny qualified immunity even though the law is not "clearly established." In this very action, prior district and appellate court decisions relied upon totally different "clearly established" law. The district judge himself, after reviewing the facts of this case on three separate occasions, admitted that he had difficultly adjudicating the limits of liability:

> Another one of the many difficulties this Court has had with this case is that there is virtually no law granting qualified immunity to a defendant in a medical case/prison context. In other words, many cases have found defendants liable, thereby

> setting a liability floor, but none have set a ceiling by which this Court can judge the limits of the liability.
>
> * * *
>
> Whether this Court would have found a reasonable official in Brutsche's shoes would have known that the "contours of the right" were clearly established as to him simply as a result of *Thomas v. Pate,* [493 F.2d 151 (7th Cir. 1974), *vacated,* 419 U.S. 813, *cert. denied,* 419 U.S. 879] is questionable; however, the gloss put on *Thomas* by *Joseph [v. Brierton,* 739 F.2d 1244 (7th Cir. 1984),] and *Bass [v. Wallenstein,* 769 F.2d 1173 (7th Cir. 1985),] has convinced the Court that it would be "splitting hairs" to distinguish Brutsche's situation from *Thomas.*

Pet. App. B18, B20. The Seventh Circuit held that *Thomas, Joseph,* and *Bass* did not clearly establish that Dr. Brutsche's conduct constituted systemic indifference to an inmate's medical needs, relying instead upon the clear trend beginning with *Newman, Finney,* and *Bishop.* Pet. App. A7. If both district and appellate judges reviewing this case have demonstrated an inability to ascertain what law was clearly established, then surely a public official in Dr. Brutsche's position could not be expected to do so fifteen years ago.

Public employees should not be required to speculate as to what constitutes a clear trend in the law which might result in the recognition of a constitutional right or analyze the future gloss that one case might put on another. Stripping government officials of qualified immunity when they act in an unsettled area of the law is inconsistent with the policy behind qualified immunity. The doctrine should protect government officials who do not violate "clearly established," pre-existing law.

The Seventh Circuit improperly modified this Court's standard on qualified immunity. The adoption and application of this improper standard is of sufficient import to public officials across the nation to merit this Court's consideration.

II.

THE UNITED STATES AGREES WITH DR. BRUTSCHE THAT THE SEVENTH CIRCUIT ERRED IN DENYING HIM QUALIFIED IMMUNITY UNDER THIS COURT'S DECISIONS

Dr. Brutsche supervised the health care of 20,000 inmates at over 30 penal institutions as Medical Director of the Federal Bureau of Prisons. No reasonable official in that position could read the trilogy of cases offered up by the Seventh Circuit and clearly know how to mold his conduct in order to avoid liability. The court of appeals found a clear trend recognizing that systemic deficiencies could constitute deliberate indifference of an inmate's medical needs, citing *Newman v. Alabama,* 503 F.2d 1320 (5th Cir. 1974), *cert. denied.* 421 U.S. 948 (1975); *Bishop v. Stoneman,* 508 F.2d 1224 (2d Cir. 1974); *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974). Yet, as the government persuasively argues, these cases are inapposite. Br. for United States 13-16.

In this case, Dr. Brutsche reasonably attempted to address a problem in a federal penitentiary. The United States notes, "To the extent the conditions [in the Terre Haute penitentiary] are a result of a scarcity of resources or of competent personnel, singling out an individual as a scapegoat for those systemic problems is wholly inappropriate." Br. for United States 18. Dr. Brutsche should not be personally liable; he should be immune from trial and civil damages.

Finally, the United States argues that "the courts below have not considered all the issues that this case presents," Br. for United States 8, and that "certain aspects of the case remain to be fully explored and may shed further light on the issues." Br. for United States 18. The government never specifies what issues have not been considered or what aspects need to be more fully explored. Frankly, Dr. Brutsche does not know what the United States is referring to and therefore respectfully disagrees.

Exhaustive discovery has been completed since this Court remanded the matter back to the district court in 1980, approximately ten years ago. Depositions of every witness in the case are in the record. A trial will not disclose any additional facts relevant to the issue of qualified immunity. Furthermore, since one of the fundamental

purposes of qualified immunity is to shield public officials from trial, such purpose will be defeated. Dr. Brutsche may also be collaterally estopped from making additional arguments at trial on the defense of qualified immunity. The district judge previously denied petitioner's "assertion of qualified immunity *as a defense*." Pet. App. Dll (emphasis added). Such a ruling indicates the district court will not reconsider the issue of qualified immunity at trial.

III.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This is a *Bivens* action against a supervisory official in the federal Bureau of Prisons seeking damages for the death of respondent's decedent. The questions presented are:

1. Whether, in a case in which there is no controlling precedent from this Court or in the relevant circuit, a consensus in the case law decided by other circuits may constitute "clearly established" law for purposes of determining whether a public official is entitled to qualified immunity.

2. Whether it was "clearly established" in 1975 that the challenged actions of petitioner with respect to the provision of medical care at the Terre Haute prison were unconstitutional.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1167

ROBERT L. BRUTSCHE, PETITIONER

v.

LINDA CLEVELAND-PERDUE, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in this case.[1]

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[1] All of the defendants in this case, including petitioner, were represented by Department of Justice counsel from the outset of the case through the determination of the threshold question of the availability of a *Bivens* remedy in *Carlson* v. *Green*, 446 U.S. 14 (1980). On this Court's remand for further proceedings in *Carlson* v. *Green*, *supra*, it was decided that the Department should no longer represent all of the defendants because of potential conflicts among the defendants. Accordingly, the Department approved a request to retain separate counsel for the defendants. Norman Carlson

STATEMENT

1. Petitioner was the Medical Director of the federal Bureau of Prisons (BOP) from 1969 through 1975, the year that the events giving rise to this lawsuit occurred. His duties included planning, directing, and controlling the comprehensive health care program of the BOP, which encompassed some 20,000 inmates at more than 30 institutions, including the penitentiary at Terre Haute, Indiana. Petitioner did not have responsibility for the daily administration of medical care to inmates; that duty was assigned to the chief physician and hospital administrator at each prison, both of whom worked directly under the warden. The chief physician was responsible for professional medical care, while the hospital administrator was responsible for the management of hospital administrative functions. Pet. App. B2.

2. During 1975, four deaths occurred among inmates receiving medical care at the Terre Haute penitentiary. Petitioner conducted an investigation of the circumstances of each death, made recommendations regarding certain corrective action, and hired a new full-time staff physician, Dr. Benjamin DeGracias, for the facility. The fourth inmate death was that of respondent's decedent, Joseph Jones, Jr., on August 14, 1975. His death led to this lawsuit. Pet. App. B2-B11.[2]

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and Dr. Robert Brutsche are represented by one set of private counsel. Dr. Benjamin DeGracias is represented by another set of private counsel. The Department is paying for the private representation of petitioner and the other defendants.

[2] The circumstances concerning the three prior inmate deaths are detailed in the district court's opinion. Pet. App. B2-B8. At the time of the first inmate death, the prison

Jones had a long history of asthma for which he had received medication and treatment within the federal prison system since his incarceration in 1973. On his request, he had been transferred to Terre Haute in July 1973 to be closer to his family. He had sought care for his asthma at the prison hospital on several occasions, and continued to take his medications. Jones had a severe asthma attack on July 28, 1975. He was admitted to the prison hospital, where he was treated for the next 36 hours, then transferred to the local hospital where he stayed another seven days and his condition improved. On the recommendation of a local hospital physician that Jones be sent to a more favorable climate, the prison hospital administrator prepared a transfer recommendation for a prison facility in Texas, with the apparent assumption that the transfer would occur directly from the local hospital. Jones was returned to the Terre Haute facility, however, before the transfer took place. Pet. App. B8-B9.

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hospital used one full-time physician (Dr. Silverman) and five local physicians on a rotating basis. (Ordinarily, there would be two full-time physicians on staff at the prison, but the expiration of the military draft, low salaries, and the unappealing nature of the work made it difficult to find a second full-time physician. Instead, the five local physicians were used to fill the second physician "slot.") As a result of his investigation of the first inmate's death, petitioner recommended that Dr. Silverman be dismissed. The warden agreed, and permitted Dr. Silverman to resign. The rotating physicians stepped up their responsibilities until another full-time physician could be hired; two more inmates died during this period. In August 1975, petitioner hired Dr. DeGracias to replace Dr. Silverman. Dr. DeGracias was hired from the Civil Service Register, without a personal interview, but after petitioner had checked all of his references. Dr. DeGracias reported for work on August 3, 1975. Pet. App. B2-B8.

Jones was discharged from the prison hospital and released to "full duty." Four days later, he experienced wheezing in both lungs and was seen as an outpatient in the prison hospital by Dr. DeGracias. On August 14, he was admitted to the prison hospital for a severe asthma attack. Dr. DeGracias prescribed treatment over the telephone several times in the course of the day and evening, but did not see Jones personally, and he rejected a recommendation to send Jones to the local hospital. When Jones became restless at about 10 p.m., Dr. DeGracias prescribed Thorazine, a tranquilizer, by telephone. The drug was administered, and at about 11 p.m. Jones went into respiratory arrest. Dr. DeGracias came to the prison hospital and ordered Jones taken to the local hospital, where he was pronounced dead at 11:40 p.m. Pet. App. B9-B10.

Petitioner visited Terre Haute to investigate Jones's death. He rechecked Dr. DeGracias's references and discussed the situation with the director of the Bureau of Prisons. He subsequently issued further recommendations to the warden regarding the maintenance of full inpatient medical records, more liberal use of outside facilities, better staff communication, review of all "problem" cases, and a policy of physician availability during off-duty hours. Pet. App. B10-B11.

3. The representative/administratrix of Jones's estate brought this *Bivens*[3] action for damages against, among others, Norman Carlson, the director of the Bureau of Prisons, Dr. DeGracias, and petitioner. (Respondent is the successor representative/administratrix). The complaint alleged that Jones's

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[3] See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

death was caused by the defendants' deliberate indifference to his medical needs, in violation of the Eighth Amendment. See *Estelle* v. *Gamble*, 429 U.S. 97 (1976). After this Court held in *Carlson* v. *Green*, *supra*, that a *Bivens* remedy is available for such a claim and survived Jones's death, the defendants moved for summary judgment on qualified immunity grounds. Pet. App. C2-C3.

The district court initially denied the motion as to all three defendants, on the ground that the "deliberate indifference" standard for stating a violation of the Eighth Amendment was "clearly established" within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Pet. App. D1-D12. The court of appeals vacated the district court's judgment and remanded with directions to apply the *Harlow* standard specifically to the undisputed facts in the record, as required by *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Pet. App. C1-C13. On remand, the district court granted the motion as to defendant Carlson, but denied the motion as to petitioner and Dr. DeGracias. The court ruled that the law regarding the medical needs of prisoners was "clearly established" by *Thomas* v. *Pate*, 493 F.2d 151, 157-159 (7th Cir.), vacated on other grounds, 419 U.S. 813, cert. denied, 419 U.S. 879 (1974) (cross-petition), and that only defendant Carlson was entitled to qualified immunity on the basis of the undisputed facts in the record. Pet. App. B1-B23.

4. Petitioner appealed,[4] and the court of appeals affirmed. Pet. App. A1-A9. The court noted that *Thomas* v. *Pate*, *supra*, did not involve allegations of "systemic deficiencies" in prison medical care and thus did not clearly establish the law for a super-

[4] Dr. DeGracias did not take an interlocutory appeal.

visory official in petitioner's position. Pet. App. A6-A7. The court also determined that at the time of the events in suit, there was no "controlling precedent" on this point in the decisions of this Court or of the Seventh Circuit. With respect to its own precedents, the court of appeals noted that there was "no decision by this court recognizing that a failure to remedy systemic deficiencies in health care services at a prison violated the eighth amendment prior to 1983." *Id.* at A7. Under these circumstances, the court held that the following standard should be applied (*ibid.*):

> In the absence of a controlling precedent we look to all relevant case law in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful. To state the proposition in another way, we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time. This approach makes eminent sense for it precludes an official from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue.

The court then applied that approach in this case. "After reviewing the relevant case law," the court found that by 1975 there was "a clear consensus" in the decisions of other courts of appeals "indicating that a prison official's failure to remedy systemic deficiencies in medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs." Pet. App. A7. In so ruling, the court relied on *Newman* v. *Alabama*, 503

F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); and *Bishop* v. *Stoneman*, 508 F.2d 1224 (2d Cir. 1974). Pet. App. A7-A9. After analyzing those cases, the court concluded that "a failure to correct systemic deficiencies in the delivery of health care services at a prison violated clearly established law in 1975," and that "given the types of systemic problems addressed in *Newman* and *Finney* * * * a reasonable official in [petitioner's] position would have known that a failure to remedy the alleged inadequacies at Terre Haute constituted deliberate indifference to the medical needs of the inmate population." Pet. App. A9.

DISCUSSION

The principal disagreement between the parties is whether the court below adopted a new standard for measuring a public official's entitlement to qualified immunity. Petitioner claims that the court of appeals adopted a standard asking whether there was a "clear trend" in the law, instead of determining whether "clearly established" law showed that a public official acted unconstitutionally. Respondent maintains that the court simply determined the state of the law in 1975 by looking to decisions of other circuits and did not adopt a new qualified immunity standard. We believe that respondent has the better of this argument and that the Seventh Circuit did not, as petitioner claims, adopt a new qualified immunity standard. By contrast, we agree with petitioner that the court of appeals erred in equating the facts of this case to the facts of those cases. Petitioner's conduct in this case did not rise to the level of "deliberate indifference" required to establish a violation of the Eighth Amendment, and thus we

believe that petitioner should have been granted qualified immunity. Nonetheless, we conclude that the issue on which we believe the court of appeals erred does not warrant this Court's review on the present petition. Moreover, the courts below have not considered all of the issues that this case presents. Accordingly, we recommend that the petition be denied.

1. A public official is entitled to qualified immunity from damages liability if his actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Court in *Harlow* did not explain precisely how the "state of the law" at a particular time should be evaluated in order to make this determination. See *id.* at 818 n.32. See also *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978).[5] But the Court has adopted several principles to guide that inquiry.

First, the qualified immunity inquiry is retrospective in nature. The task is to determine "not only the currently applicable law, but whether that law was clearly established at the time an action occurred," *Harlow*, 457 U.S. at 818, because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Put another way, an "official cannot be expected to predict the future course of constitutional law." *Navarette*, 434 U.S.

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[5] *Procunier* involved a suit under 42 U.S.C. 1983, rather than a *Bivens* action; this Court has explained that the scope of immunity available to federal officers in a *Bivens* action is generally the same as that available to state officials sued under Section 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. at 818 n.30; *Butz* v. *Economou*, 438 U.S. 478, 504 (1978).

at 562.[6] Second, the pre-existing law must be established with a considerable degree of factual specificity so that an official can know whether his own conduct is unlawful. *Anderson*, 483 U.S. at 639-641. The right alleged to have been violated must have been "clearly established" in a "particularized" sense, *id.* at 640; a court's inquiry into the state of the law must be "fact-specific," *id.* at 641; and the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," *id.* at 640. It is unnecessary for the "very action in question" to have been already held unlawful, but in light of pre-existing law its illegality "must be apparent." *Ibid.*

What remains unclear are the *sources* of law to which a court may look in making its inquiry. The Court held in *Navarette*, 434 U.S. at 563-565, that the "law" concerning the censorship of prisoners' mail was not "clearly established" by any decision of "this Court, of the Courts of Appeals, or of the local District Court." Similarly, in *Mitchell* v. *Forsyth*, 472 U.S. 511, 530-535 (1985), the Court ruled that the law regarding the Executive's authority to conduct warrantless domestic security wiretaps was not "clearly established" in 1970 because six successive administrations had considered that practice consti-

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[6] Accord *Anderson*, 483 U.S. at 640 ("in the light of pre-existing law the unlawfulness [of an official's conduct] must be apparent"); *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984); *Harlow*, 457 U.S. at 818 (an official cannot "reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful"); *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967). See also *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) (an official is immune unless "the law clearly proscribed the actions" he took).

tutional; only three years beforehand this Court had expressly left that possibility open in *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967); and two district courts had agreed with the Executive's position. But this Court has offered little guidance beyond those decisions, and has never determined whether the law must be "clearly established" by decisions of courts (federal or state, appellate or trial) in the same jurisdiction where the allegedly unlawful events took place.

Here, the Seventh Circuit found no "controlling precedent" in its own decisions or in the decisions of this Court. Pet. App. A7. It therefore turned to the decisions of other circuits involving claims that systemic deficiencies in a prison's health care facilities rendered the medical treatment constitutionally inadequate. *Ibid.* Petitioner does not challenge the court of appeals' decision to consider the case law in other circuits to determine whether the "law" was clearly established in 1975. Pet. Reply Br. 6. Instead, petitioner argues that the court of appeals, in so doing, erred by reformulating the *Harlow* "clearly established" standard as a "clear trend" standard, which requires an official to hazard a guess about the future development of constitutional law. *Id.* at 6-7.

We do not believe that, fairly read, the court below established an improper standard for determining whether, at the time of the acts in question, the governing law was clearly established. The court said, in substance, that even in the absence of a controlling precedent in this Court or the relevant court of appeals, a right can be clearly established if there was in other courts a sufficiently clear consensus on the issue that the announcement of a controlling precedent was simply a question of time. And the court then proceeded to find such a "clear consensus" in the

decisions of three other federal courts of appeals—decisions that, in its view, involved "systemic deficiencies in medical services akin to those alleged in the present case." Pet. App. A7.

We agree that a controlling precedent in this Court or in the relevant court of appeals is not invariably required in order for a constitutional right to be clearly established. To be sure, difficult questions may be presented in particular cases—for example, whether an issue has been sufficiently litigated, and whether a particular individual may properly be held to have lost a claim of qualified immunity on the basis of decisions in jurisdictions other than his own. But in this case, the officer in question—the Medical Director of the federal Bureau of Prisons—was a federal official with national responsibilities, and the courts whose decisions were regarded as founding the consensus were three federal courts of appeals.[7] Moreover, no contrary decisions of other courts were noted. In these circumstances, we do not think the use of a "consensus" standard by the court below was improper.

Furthermore, the decision below does not conflict with the decision of any other court of appeals. Petitioner (Pet. 11-12) asserts a conflict with the decision of the D.C. Circuit in *Zweibon* v. *Mitchell*, 720 F.2d 162 (1983), cert. denied, 469 U.S. 880 (1984), but no such conflict in fact exists. *Zweibon* involved a *Bivens* action based on the authorization without a warrant of certain "national security" wiretaps. At an earlier stage of the case, the court of appeals had held that the authorization of such wiretaps was unlawful and that the decision should be given retroactive effect

[7] The court of appeals' approach might well be inappropriate for an official without such national responsibilities.

with respect to the plaintiffs' constitutional claims. See *Zweibon* v. *Mitchell*, 606 F.2d 1172 (1979), cert. denied, 453 U.S. 912 (1981). But, at that stage, the court had left open the issue of qualified immunity, 606 F.2d at 1181, and in its 1983 decision, the court determined that the defendant's claim of qualified immunity should be upheld. The court noted that when the wiretaps were initially installed, "the only federal courts that had addressed the issue * * * had concluded that warrants were unnecessary" (720 F.2d at 169), and that even when the wiretaps were renewed, lower court decisions were sharply divided. *Id.* at 171-172. The court emphasized the difference between, on the one hand, the question whether a constitutional holding should be given retroactive effect because that holding was "clearly foreshadowed" and, on the other hand, the question whether a constitutional right was "clearly established" at a particular time for purposes of qualified immunity. *Id.* at 172-173.

Thus, the court in *Zweibon* said nothing that would conflict with the approach of the court below. Indeed, no argument could have been made in *Zweibon* that there was anything approaching a consensus supporting recognition of a constitutional right during the period of the conduct at issue. And the D.C. Circuit went out of its way to emphasize that its determination with regard to retroactivity was based on a wholly different standard from the standard applicable to qualified immunity.[8]

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[8] Petitioner apparently views the court of appeals' decision as establishing a standard equivalent to the "clearly foreshadowed" test rejected in the *Zweibon* qualified immunity decision. Pet. 11-12. In view of the court of appeals' explicit reliance in this case on its determination that "a clear consensus had been reached" (Pet. App. A7), we do not share petitioner's reading of the court of appeals' decision.

2. Although we do not disagree with the standard articulated by the court below in the context of this case, we agree with petitioner that the application of that standard in light of the available precedents was incorrect. As noted above, the court concluded that there was "a clear consensus" generally "indicating that a prison official's failure to remedy systemic deficiencies in medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs." Pet. App. A7. That "consensus" was purportedly evidenced by the decisions in *Newman* v. *Alabama*, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974); and *Bishop* v. *Stoneman*, 508 F.2d 1224 (2d Cir. 1974). But an examination of the facts of those cases demonstrates that the court of appeals' reliance on them to defeat petitioner's claim of qualified immunity was unwarranted.

First, the conditions found unconstitutional in those cases were substantially more pervasive and more severe than those relied on here. Thus, the decisions provided little indication of what constitutes "deliberate indifference" in less extreme circumstances. Second, while the courts in *Newman*, *Bishop*, and *Finney* had begun to recognize that prison administrative officials generally have a duty to provide a constitutionally adequate system for the delivery of inmate medical care, they did not focus on the particular level of responsibility of any individual prison official. Specifically, none of the cases indicated, much less "clearly established," the minimum constitutional expectations for an official in petitioner's position, who was not responsible for the daily administration of inmate medical care and who had no direct authority over those (the warden, prison

physician, and prison hospital administrator) who were.

The *Newman* case was a class action for declaratory and injunctive relief for inadequate prison health care brought against the State of Alabama and its prison system as a whole. The court made no attempt to fix individual responsibility among the various state officials or levels of prison administration involved, which included the state attorney general, the warden of the prison system's central hospital facility, the Alabama Board of Corrections, its commissioner, its chairman, and four members. 503 F.2d at 1322 & n.2. Indeed, the court noted with sympathy that the defendant prison officials were collectively "shackled by anachronistic equipment, inadequate staffing, and parsimonious funding," which rendered "Sisyphean" their task of providing constitutionally adequate care. *Id.* at 1333.

In addition, the conditions alleged here are not comparable in scope or degree to those found to be unconstitutional in *Newman*. *Newman* involved deficiencies both in the prison system's central hospital facility and in the health units of some 19 other institutions. The conditions at the facilities included use of part-time or no professional medical staff, unsanitary cleaning procedures and equipment, chronic shortages of basic medical supplies (forcing one institution to use rags and towels in lieu of gauze for bandages), outdated anesthetic procedures and equipment, lack of ambulances, lack of fire emergency procedures, lack of treatment for the mentally ill, and specific instances of maltreatment including a wound discovered to be infested with maggots for which the dressing remained unchanged for another 20 days, and a fatal amputation made necessary because an incontinent geriatric inmate was forced to sit on a wooden bench all day to

keep his bed clean. The central hospital prison and diagnostic center itself was found not only to be understaffed in many respects but also, like the other prisons, to be suffering from unsanitary conditions, obsolete equipment and drugs, delays, and limitations on treatment. 503 F.2d at 1322-1324.

Bishop was a suit under 42 U.S.C. 1983 for injunctive relief against the Vermont commissioner of corrections and the warden of the state prison, alleging constitutionally inadequate prison medical care. The allegation was based primarily on specific instances of lengthy delays to see the prison's single, part-time physician (six months for a back problem; a three-week wait while an inmate lost 30 pounds due to later-diagnosed cirrhosis of the liver; a three-day wait while an inmate with a fever was vomiting blood; a one-week wait for an inmate who could not eat and was vomiting; and a one-week wait to see the doctor for severe stomach pains, which upon surgery at a local hospital turned out to be caused by a gangrenous appendix). 508 F.2d at 1225. The Second Circuit held these allegations sufficient to state a claim of deliberate indifference to prisoner medical needs, and remanded the case for further proceedings on the prayer for an injunction. The court had no occasion to fix responsibility between the two defendant officials—the commissioner of corrections and the prison warden—who in any case did not occupy positions of authority comparable to petitioner's. And the claims showed a pattern of more severe lack of access to professional medical attention than is supported by the allegations here.

Finney was also a suit under 42 U.S.C. 1983 for declaratory and injunctive relief against various Arkansas state prison officials and others, seeking correction of a broad range of alleged unconstitutional

prison conditions, among them inadequate medical care. One of the two prisons in question employed *no* physician or psychiatrist; neither prison had dentists or registered professional nursing supervision; inmates with contagious diseases were not isolated; there was "not even basic emergency service"; and the medical facilities did not meet basic hospital licensure standards. 505 F.2d at 202-204. The court also emphasized a state study of the prison's health care service, which had found a "[l]ack of sufficient [non-inmate] personnel," "completely inadequate" equipment, and the need for "more professional assistance," "[b]etter transportation," and maintenance of more complete medical records, *id.* at 203, but the court did not delineate the conditions underlying those conclusions.

Thus, even had these decisions been "controlling precedents" in the Seventh Circuit, they did not reasonably put petitioner, in the particular circumstances of this case, on notice of a "right" whose "contours * * * [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson*, 483 U.S. at 640. Nor, "in the light of pre-existing law," would the unlawfulness of petitioner's actions in responding to the conditions alleged here have been "apparent." *Ibid.*[9]

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[9] For the same reasons, *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974), cited by respondent, also did not "clearly establish" the relevant law. *Gates* was an injunctive action against the superintendent of the Mississippi state penitentiary, the state penitentiary board and the state governor alleging a broad range of unconstitutional conditions at the state penitentiary, including inadequate medical care. The court of appeals affirmed (and the defendants admitted) that the district court's findings of a lack of "prompt or efficient" medical treatment, "rampant" "[u]nsanitary conditions," failure to

3. Although we disagree with the result reached by the court below, we believe that this Court's review is not warranted at this time.

With respect to petitioner's first question, the standard articulated by the court of appeals for determining whether a right was clearly established is not, in this context, an incorrect one, nor does it conflict with the approach taken in any other circuit. The defendant is a federal official with nationwide responsibilities, and the "consensus" found to exist by the court below was based on consideration of a number of decisions of federal appellate courts.

With respect to petitioner's second question, we agree with petitioner that the court of appeals erred in its conclusion that the facts underlying the decisions in three other Circuits were "akin to those alleged in the present case." Pet. App. A7. However, we believe that the detailed factual comparison of this case with those other decisions, as required by *Anderson* v. *Creighton*, is not an issue that calls for this Court's further review on this petition. More-

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isolate contagious inmates, complications caused by "lack of medical treatment," and a practice of discouraging inmates from seeking care by "punishing those who on examination appear to be healthy," 501 F.2d at 1300, amounted to unconstitutional treatment. *Id.* at 1303-1304. But while the court upheld "for the time being" the specific staffing and administrative changes prescribed by the district court (including an order to employ at least three full-time physicians and six full-time licensed or registered nurses, to comply with national standards for prisoner medical care, and to bring plant and equipment into compliance with state licensing requirements), it did not pass on the constitutional necessity for such changes, stating that "any decision dissecting what precise degree of improvements in [the areas of medical care and physical facilities] is necessary to meet constitutionally minimal standards is premature at this stage." *Id.* at 1304.

over, certain aspects of the case remain to be fully explored and may shed further light on the issues. As noted above, even if the conditions of treatment in this case amounted to a deprivation of a constitutional right, serious questions remain of the extent to which an individual official may be held accountable in damages for those conditions. To the extent that the conditions are the result of a scarcity of resources or of competent personnel, singling out an individual as a scapegoat for those systemic problems is wholly inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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